Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING,

Petitioner,

—v.—

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

Chronological List of Relevant Docket Entries

April 23, 1970—Plaintiff's original complaint filed in U.S. District Court for the Southern District of Florida

July 10, 1970—Plaintiff's second amended complaint filed

July 20, 1970—Defendant's answer to second amended complaint filed

October 30, 1970—Order entered granting plaintiff's motion for summary judgment, and denying defendant's motion for summary judgment

November 27, 1970—Judgment of District Court entered, awarding plaintiff the sum of $100 plus costs and attorney's fees

December 11, 1970—Defendant's notice of appeal filed

September 27, 1971—Opinion and judgment of the Court of Appeals for the Fifth Circuit

UNITED STATES FEDERAL COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-Civ-WM

LEILA MOURNING, and all persons similarly situated,
PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

Filed July 10, 1970

SECOND AMENDED COMPLAINT

COMES NOW, the Plaintiff, LEILA MOURNING, and all persons similarly situated, by and through her undersigned attorneys and sues the Defendant, FAMILY PUBLICATIONS SERVICE, INC., and alleges:

I JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title I of the U.S. Consumer Credit Protection Act, 15 U.S.C. Section 1601 et seq.
2. The Plaintiff, LEILA MOURNING, is a 73 year old widow having her domicile in Dade County, Florida.
3. Defendant, FAMILY PUBLICATIONS SERVICE, INC., is a foreign corporation doing business in the State of Florida; and is a creditor within the purview of the Truth-in-Lending Act (15 U.S.C. Section 1601 et seq), and Regulation Z, 12 C.F.R. 226 which governs the enforcement of that Act.
4. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of herself and all other persons similarly situated. Plaintiff

is a member of a class composed of consumers in or about Dade County, Florida, who subsequent to July 1, 1969, entered into a written standard form contract with the Defendant, which violated the Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq., and 12 C.F.R. 226. The persons in this class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to all members of the class; the claims of the representative party are typical of the claims of the class and the representative party will fairly and adequately protect the interest of the class.

The alternative requirement of the class action as set out in Rule 23(b) (3) is met since the Defendant entered into a substantially identical contract with all members of the class. The damages claimed by each member of the class are identical. Therefore, the questions of law and fact common to the class dominates over any questions that might affect any individual member of the class.

II STATEMENT OF CLAIMS

5. Plaintiff entered into a written contract with the Defendant for the purchase of magazines, on or about August 19, 1969 (a copy of said contract is attached hereto and hereby made a part hereof; as Plaintiff's Exhibit 1). The standard form contract required the Plaintiff, LEILA MOURNING, to make thirty (30) monthly payment of three dollars and ninety-five cents ($3.95) each, in return for which she would receive the magazines for sixty (60) months. Said contract is the only instrument executed and existing between the parties.

6. Said contract fails to contain a disclosure as to the total purchase price, finance charges, service charges or the amount to be financed, all of which causes the contract to be in violation of the Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq. Defendant never advised Plaintiff of omission of required disclosures and Plaintiff never agreed to waive same.

7. In the ordinary course of business, Defendant, FAMILY PUBLICATIONS SERVICE, INC., extends Consumer Credit as defined in Regulation Z, 12 C.F.R. 226.2(K) as was duly promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I of the U.S. Consumer Credit Protection Act, 15 U.S.C. Section 1601 et seq.

8. Under these contracts, the Defendant, FAMILY PUBLICATIONS SERVICE, INC., in the ordinary course of their business is a creditor as that term is defined in Regulation Z, 12 C.F.R. 226.2(m) the regulation promulgated under the Federal Truth-in-Lending Act, 15 U.S.C. Section 1601 et seq.

9. In the ordinary course of business, Defendant, FAMILY PUBLICATIONS SERVICE, INC., as a creditor as defined by 12 C.F.R. 226 has failed to make the following mandatory disclosures:

1. "Cash price"	12 C.F.R. 226.8(C)(1)
2. "Cash downpayment"	12 C.F.R. 226.8(C)(2)
3. "Unpaid balance of cash price"	12 C.F.R. 226.8(C)(3)
4. "Amount financed"	12 C.F.R. 226.8(C)(7)
5. "Date payments are to begin"	12 C.F.R. 226.8(b)(1)
6. "Total of payments"	12 C.F.R. 226.8(8)

7. Defendants failed to make these disclosures prior to consummating the transaction as required by 12 C.F.R. 226.8(A).

15 U.S.C. Section 1638, Defendant was required to make these disclosures in the contracts made with the Plaintiff, but failed to do so in violation of the Federal Truth-in-Lending Act and its regulations.

10. Defendant corporation, acting individually and as agent for various publishers used the telephone and sales personnel to solicit business; and did so act in relation to Plaintiff's herein.

WHEREFORE the Plaintiff demands that the Court take jurisdiction of the parties and all matters herein, enter judgment for Plaintiff and order Defendant to pay penalties pursuant to applicable statutory provisions, plus the reasonable attorneys fees and costs, and any other remedies deemed proper by Court herein.

ECONOMIC OPPORTUNITY LEGAL SERVICES

By /s/ Philip L. Coller
PHILIP L. COLLER, ESQUIRE
SALLY WEINTRAUB, ESQUIRE
Attorneys for Plaintiff

ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM, INC.
17430 South Dixie Highway
Perrine, Florida 33157
Telephone: 233-1850

OF COUNSEL:

ELIZABETH DU FRESNE
ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM, INC.
395 Northwest First Street
Miami, Florida 33128
Telephone: 379-0822

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to FRATES FAY FLOYD & PEARSON, Twelfth Floor Concord Building, Miami, Florida, this 8th day of July, 1970.

/s/ Philip L. Coller
PHILIP L. COLLER

Contract No. 880 L-44

Please Make Checks Payable To

FAMILY PUBLICATIONS SERVICE, Inc.

Code If correspondence is necessary please address to branch office below.

			If renewal check box	
LF	Life Magazine	260	Issues	☐
			Issues	☐
LH	Ladies Home Journal	60	Issues	☐
US	Travel & Camera	60	Issues	☐
HL	Holiday	60	Issues	☐
			Issues	☐
			Issues	☐
			Issues	☐

This Order Guaranteed by a $6,000 Bond Deposited with Central Registry, N.Y.C.

PAY ONLY $3.95 NOW

Pay collector $3.95 each month for 30 months
All amounts plus tax if any
Nothing to be paid for remaining 30 months
Sales agent forbidden to accept more than down payment of $3.95
Verbal Agreements Not Recognized
No magazines delivered by sales agent
All issues specified mailed direct from Publisher

Please accept my order for the magazines selected above for the terms indicated.

I have paid sales agent a down payment of $3.95 and agree to pay Family Publications Service, Inc., 30 equal instalments of $3.95 each month for 30 consecutive months.

Payments to be made to collector when he calls or by mail to Teaneck, N.J. (07666) or to your branch office at

Family Publications Service, Inc.
402 Plaza Building, 245 S.E. First Street
Miami, Florida 33131

This Contract Is Not Subject To Change or Cancellation after acceptance or verification

All contracts received subject to approval and acceptance at the home office of Family Publications Service, Teaneck, N.J. Payments due monthly, otherwise entire balance due. You Agree To Notify Us Before Changing Address.

Subscriber Signature Miss Mrs. Mr. /s/ L. Mourning
(Representative is not permitted to sign subscriber's name)

Name (print) Mrs. Leila Mourning

Own 4 yrs Mailing Address (print) 15295 Garfield Dr.

Apt. No. —— Phone No. 247-1652

City (print) Homestead State Fla Zip Code 33030

Occupation & Business Retired

Business address ———— Business Phone No. ————

Sales agent Cooney Date 8-10-69

Subscriber's Verification Signature /s/ L. Mourning

Verified by /s/ Charles Escalanto Date 8-19-69

Fill In Collection Address on Reverse Side

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO: 70-559-Civ-WM

Filed July 20, 1970

LEILA MOURNING, and all persons similarly situated, PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

ANSWER TO SECOND AMENDED COMPLAINT

The Defendant, for its answer to the Second Amended Complaint, says:

1. It is without knowledge or information sufficient to form a belief as to the truth of the averments of Paragraph Two.

2. It denies the allegations of Paragraphs Three and Four except that it is engaged in interstate business in the State of Florida, and avers that it is a Delaware corporation.

3. It denies the allegations of Paragraph Five and Six, except that on August 19, 1969, Leila Mourning, and at various times after July 1, 1969, other persons, executed with Defendant in Dade County, Florida, contracts to which Defendant refers for the terms and conditions thereof.

4. It denies the allegations of Paragraphs Seven, Eight and Nine.

5. It denies the allegations of Paragraph Ten, except that it is in the business of soliciting subscrptions to magazines personally or by telephone and did so act in relation to Plaintiff.

FOR A FIRST DEFENSE, DEFENDANT AVERS:

6. Defendant is in the business of soliciting subscriptions to magazines. By arrangement with various publishers it offers to provide a selection of magazines of varied types. Potential customers are solicited by telephone or personally and offered a contract for the purchase of, usually, five magazines for four or five years at a total cost significantly below that at which those magazines may be purchased on the newstands. Under the contract executed by the customer and Defendant, the customer agrees to pay a stated amount per month for half of the life of the contract and Defendant agrees to supply the magazines for the full term of the contract. At all times the customer has prepaid for the magazines to be delivered. Under its arrangement with most of the publishers, Defendant reimburses the publisher periodically during the full term of the subscription.

7. The transaction between Defendant and its customer is not a "credit transaction" or a "credit sale" and Defendant is not a "creditor" of the subscriber nor does it extend "consumer credit" as those terms are used in 15 U.S.C. § 1601 et seq. At no point during the life of the contract has Defendant paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future.

8. The price paid by the customer for the magazines purchased from Defendant does not include any finance charge, interest, debt service, time-price differential, or any other payment in respect of any extension of credit.

9. The usual transaction between Defendant and its customer is not covered by 15 U.S.C. § 1601 et seq. In particular, the transaction between Defendant and this Plaintiff is not covered by the terms of 15 U.S.C. § 1601, et seq.

10. In good faith Defendant has relied upon a rea-

sonable interpretation of 15 U.S.C. § 1601, et seq., and the regulations promulgated thereunder by the Federal Reserve Board that such statute and regulations are not applicable to it and has not made any of the disclosures required of those to whom such statute is applicable.

FOR A SECOND DEFENSE DEFENDANT AVERS:

11. This Court lacks jurisdiction over the subject matter of this action because, as provided in 15 U.S.C. § 1601, et seq., primary jurisdiction over the controversy is lodged either in the Federal Reserve Board or in the Federal Trade Commission, or in both.

FOR A THIRD DEFENSE DEFENDANT AVERS:

12. Administrative proceedings in the Federal Reserve Board or the Federal Trade Commission or both are superior and available methods for the fair and efficient adjudication of the controversy.

13. This is an action for a civil penalty and as such may be maintained, if at all, only by Plaintiff in her individual capacity.

14. Plaintiff's action may not be maintained, if at all, as a class action.

WHEREFORE, Defendant, Family Publications Service, Inc., demands judgment dismissing this action and the complaint, with its costs and disbursements.

WE HEREBY CERTIFY that a true copy of the foregoing Answer to Second Amended Complaint was mailed on this 20 day of July, 1970, to Philip L. Coller, Esquire, Attorney for Plaintiff, Economic Opportunity Legal Services Program, Inc., 17430 South Dixie Highway, Perrine, Florida.

FRATES FAY FLOYD & PEARSON
Attorneys for Defendant
12th Floor Concord Building
Miami, Florida 33130
By /s/ James D. Little

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-Civ-WM

REQUEST FOR ADMISSION OF FACTS

LEILA MOURNING, and all persons similarly situated, PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

The Plaintiff, LEILA MOURNING, requests the Defendant, FAMILY PUBLICATIONS SERVICE, INC., on or about the 6th day of July, 1970, to make the following admissions under Federal Rules of Civil Procedure, Rule 36 of facts for the purpose of this action only and subject to such pertinent objections to admissibility as may be imposed at the trial.

1. State whether Defendant sent Plaintiff on December 16, 1969, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.
2. State whether Defendant sent Plaintiff on December 24, 1969, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.
3. State whether Defendant sent Plaintiff on January 1, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.
4. State whether Defendant sent Plaintiff on January 8, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.
5. State whether Defendant sent Plaintiff on January 22, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.
6. State whether Defendant sent Plaintiff on April 9, 1970, the letter, a copy which is attached hereto and

made a part hereof by reference is a true and correct copy.

7. State whether Defendant sent Plaintiff on May 1, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

8. State whether Defendant sent Plaintiff on June 1, 1970, the letter, a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

9. State whether Defendant sent Plaintiff this invoice (Three Monthly Payments Due this Month), a copy which is attached hereto and made a part hereof by reference is a true and correct copy.

/s/ Philip L. Coller
PHILIP L. COLLER, ESQUIRE
SALLY WEINTRAUB, ESQUIRE
Attorneys for Plaintiff
ECONOMIC OPPORTUNITY
LEGAL SERVICES PROGRAM, INC.
17430 South Dixie Highway
Perrine, Florida 33157
Telephone: 233-1850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REQUEST FOR ADMISSIONS OF FACTS was mailed to FRATES FAY FLOYD & PEARSON, Twelfth Floor Concord Building, Miami, Florida, 33130, this 22nd day of June, 1970.

/s/ Philip L. Coller
PHILIP L. COLLER

Dear Subscriber:

A statement of the amount now due on your magazine contract with us is shown below.

YOUR PROMPT REMITTANCE WILL BE GREATLY APPRECIATED.

Our low prices and convenient terms are available because we rely on the cooperation of our subscribers in making payments promptly as due.

Kindly return your remittance in this envelope. It contains the information we need to properly credit your account.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

Amount due $51.35 Date Jun 1 1970
(Taxes included, if Any)

Contract No __________ Route ________

If you wish to pay in full, please remit $________
(Taxes Included, If Any)

If your remittance has been made, please disregard this note and accept our thanks for your payment.

If you wish $55.30 will pay you thru next month.
(Taxes Included, If Any)

[Illegible figures]—395

MRS. L. MOURNING
15295 GARFIELD DR
HOMESTEAD FL 33030

C

FPS FAMILY PUBLICATIONS SERVICE, INC.

April 9, 1970

Mr. Philip L. Coller
17430 S. Dixie Hwy.
Pecrine, Florida 33157

RE: Mrs. Leila Mourning
Acct. #1541997

Dear Sir:

Be advised that Family Publications Service, hereafter referred to as FPS, must insist that Mrs. Mourning comply to the terms of her contract.

Whereas, FPS, acts initialy as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guaranter of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fullfilment of said terms in the aforementioned contract result in mutual resolve of liability.

Very truly yours,

FAMILY PUBLICATIONS SERVICE, INC.

/s/ Robert Hibbard
Robert Hibbard
Manager

RH/jmc
Enclosures: copy of contract

Dear Subscriber:

A statement of the amount now due on your magazine contract with us is shown below.

YOUR PROMPT REMITTANCE WILL BE GREATLY APPRECIATED.

Our low prices and convenient terms are available because we rely on the cooperation of our subscribers in making payments promptly as due.

Kindly return your remittance in this envelope. It contains the information we need to properly credit your account.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

Amount due $7.90 Date May 1 1970
(Taxes Included, If Any)

Contract No. ______________ Route ______________

If you wish to pay in full, please remit $____________
(Taxes Included, If Any)

If your remittance has been made, please disregard this note and accept our thanks for your payment.

If you wish $11.85 will pay you thru next month.
(Taxes Included, If Any)

154197-7 395

MRS. L MOURNING
15295 GARFIELD DR
HOMESTEAD FL 33030

Dear Subscriber:

A statement of the amount now due on your magazine account with us is shown below.

YOUR PROMPT REMITTANCE WILL BE GREATLY APPRECIATED.

Our low prices and convenient terms are available because we rely on the cooperation of our subscribers in making payments promptly as due.

Kindly return your remittance in this envelope, [illegible] contains the information we need to properly credit your account.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

Amount due on or before May 1 1979 [illegible]
(Taxes Included, If Any)

Contract No. [illegible]

If you wish to pay in full, please remit $ [illegible]
(Taxes Included, If Any)

If your remittance has been made, please disregard this note and accept our thanks for your payment.

If you wish $11.55 will pay you thru next month.
(Taxes Included, If Any)

1611374 205

MRS D MONTGOMERY
[illegible] DR
HOMESTEAD FL 33030

FAMILY PUBLICATIONS SERVICE, INC.

245 S.E.FIRST STREET
MIAMI FL 33131

FAMILY PUBLICATIONS SERVICE, INC.
Reminder Notice

INVOICE - Three Monthly Payments Due This Month

Dear Subscriber:
Our Delinquent Department has [illegible] that your account is in arrears by the AMOUNT DUE shown [illegible]. Further [illegible] can make the entire balance payable at once. [illegible] remit the AMOUNT DUE by return mail WITH THIS INVOICE in the [illegible] envelope herewith.

THIS BILL MUST BE RETURNED WITH YOUR PAYMENT

FAMILY PUBLICATIONS SERVICE, INC.
245 S.E.FIRST STREET
MIAMI FL 33131

Branch	Contract No.	Date Prep'd Mo.	Day	Yr	P.	CC
330	154155 [illegible]	[illegible] 2	31	65	N	3

MRS. L. MOURNING
15295 GARFIELD CR
HOMESTEAD FL 33030

PLEASE INDICATE ABOVE ANY CHANGE OF ADDRESS

[illegible] .85	Amt. Due $1[illegible].80

PAY THIS AMOUNT AND YOUR ACCOUNT WILL BE PAID THROUGH NEXT MONTH
IF AMOUNT DUE HAS BEEN PAID, KINDLY DISREGARD THIS NOTICE.

FAMILY PUBLICATIONS SERVICE INC.

Reminder No.

INVOICE - Three Monthly Payments Due Each Month

FAMILY PUBLICATIONS SERVICE, INC.

245 S.E. FIRST STREET

MIAMI FL 33131

FAMILY PUBLICATIONS SERVICE, INC.

245 S.E. FIRST STREET

MIAMI FL 33131

MRS L. PCURKING

15255 CARFIELD DR

HOMESTEAD FL 33030

PLEASE INDICATE ABOVE ANY CHANGE OF ADDRESS

PAY THIS AMOUNT AND YOUR ACCOUNT WILL BE PAID THROUGH

IF AMOUNT DUE HAS BEEN PAID, KINDLY DISREGARD THIS NOTICE.

FAMILY PUBLICATIONS SERVICE, Inc.

Jan 22, 1970

Mrs. L. Mourning 1541997
15295 Garfield DR
Homestead, Fl 33030

Contract No.

Dear Subscriber:

The time is here NOW! We cannot wait any longer for your payment.

We give you 48 hours to forward the entire balance of $118.50.

Our Legal Department has been informed of this matter.

Sincerely,

/s/ A. Carr
A. Carr

FAMILY PUBLICATIONS SERVICE, Inc.

Jan 8, 1970

Mrs. L. Mourning
15295 Garfield Drive
Homestead, Fla. 33030

DELINQUENT DEPARTMENT

CONTRACT NO. 154199-7

AMOUNT DUE $19.75

Dear Customer:

We must have payment on your account this week in order to eliminate your name from appearing on our monthly delinquent report. This report is made up of customers who fail to make their monthly payment. Copies of this report are sent to our attorney and to our home office.

Pay now and avoid the embarrassment of having your name appear on this report. Make all checks or money orders payable to Family Publications Service.

Yours truly,

/s/ C. Bear
C. BEAR
Collection Manager

FAMILY PUBLICATIONS SERVICE, Inc.

Jan 1, 1970

Mrs. L. Mourning 1541997
15295 Garfield Dr
Homestead, Fl 33030

DELINQUENT DEPARTMENT

Re: Contract No.

Amount Due 15.80

Dear Subscriber:

Frankly, we are reluctant to turn your account over to our attorney for collection. After all, legal action is expensive and unpleasant.

Therefore, we are going to give you every opportunity to avoid outside collection of your account.

It will be necessary for you to do your part. Your check for the amount now due, within the next five days, and satisfactory assurances about paying the balance of the account, are what we consider your part. It's your move next.

Sincerely,

/s/ C. Bear
C. Bear

FAMILY PUBLICATIONS SERVICE, Inc.

December 24, 1969

Mrs. L. Mourning 1541997
15295 Garfield DR
Homestead, Fl 33030

Contract No.
Amount Due $11.85

Dear Subscriber:

I am very much surprised to see that you have not made payment on your magazine account in the past 3 months.

After an account is three months delinquent it is brought to my attention. I feel that you should realize that you are receiving our merchandise which we have paid for. Had you dealt directly with the publishers yourself, you would have had to pay them in advance for the magazines.

Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account*, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan.

I am fully confident that you will realize your obligation and remit your payment. We are allowing you four days from the date of this letter to send your payment to this office before we take other measures to collect your account.

Make your check or money order payable to Family Publications Service, Inc. and mail today.

Respectfully,

/s/ A. Carr
A. CARR

FAMILY PUBLICATIONS SERVICE, INC.

Please Reply To:

Dec 16 1969

Amount Due $12.33

Contract No. 154199-7

Mrs. L. Mourning
15295 Garfield Dr.
Homestead, Fl. 33030

Dear Subscriber:

Recently you signed a contract order with us for magazine subscriptions which we appreciate.

As soon as your order reached us—and before the magazines started going to you—we confirmed your order asking you to make any necessary corrections.

After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take. The contract you signed is: Not subject to cancellation after acceptance or verification.

Knowing, therefore, the obligations we have incurred in your name, we feel confident that you will continue your magazine subscriptions and make the convenient monthly payments regularly and promptly.

The amount necessary to bring your account to date is indicated above. Will you please attach your remittance to this letter and mail it today in the self-addressed envelope attached? Thank you.

Cordially yours,

FAMILY PUBLICATIONS SERVICE, INC.

C22:CC P.S. If you have remitted, please disregard this letter and accept our thanks for your payments.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-Civ. WM

LEILA MOURNING, and all persons similarly situated,
PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

RESPONSE TO REQUEST FOR ADMISSION OF FACTS

Family Publications Service, Inc., defendant, makes the following response to the Request for Admission of Facts served upon it by plaintiff on June 22, 1970.

Request No. 1. Admitted.

Request No. 2. Admitted.

Request No. 3. Admitted.

Request No. 4. Admitted.

Request No. 5. Admitted.

Request No. 6. Defendant admits that the letter referred to in Request No. 6 appears on its stationery and was written by its employee Robert Hibbard, but denies that defendant sent plaintiff this letter because Robert Hibbard was not authorized to send said letter.

Request No. 7. Admitted.

Request No. 8. Admitted.

Request No. 9. Admitted.

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

Stanley R. Swanson, being duly sworn according to law, deposes and says:

1. I am the Vice President of Family Publications Service, Inc., and make this affidavit on its behalf as I am authorized to do.

2. I have read the foregoing Response by Family Publications Service, Inc., to the Request for Admissions filed by the plaintiff. I am familiar with the contents thereof and the same are true to the best of my knowledge, information and belief.

/s/ Stanley R. Swanson
STANLEY R. SWANSON

Sworn to before me this 17th day of July 1970.

MURRAY R. ASOFSKY
Notary Public

FRATES FAY FLOYD & PEARSON
Attorneys for Defendant Family Publications
12th Floor, Concord Building
Miami, Florida 33130

By /s/ James D. Little
JAMES D. LITTLE

WE HEREBY CERTIFY that a true copy of the foregoing Response to Request for Admissions was mailed on this 20th day of July, 1970 to Philip L. Coller, Esquire, Attorney for Plaintiff, Economic Opportunity Legal Services Program, Inc., 17430 South Dixie Highway, Perrine, Florida.

By /s/ James D. Little
JAMES D. LITTLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-CIV-WM

AFFIDAVIT OF JOHN C. MAYS
LEILA MOURNING, PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

AFFIDAVIT IN SUPPORT TO CLASS ACTION DETERMINATION MOTION

STATE OF FLORIDA)
) ss.:
COUNTY OF DADE)

John C. Mays, being duly sworn, deposes and says:

I am a citizen of the United States, over 21 years of age and a resident of Dade County, Florida. I am presently the director of the Metropolitan Dade County Consumer Protection Division. I am fully familiar with the facts and the provisions of the law applicable thereto. I make this affidavit in support of Plaintiff's motion that this action be maintained as a class action.

1. My office has made an investigation into the business of the Defendant, Family Publications Services Inc. This investigation started because of numerous complaints we received from citizens of Dade County. My office has the responsibility of enforcement of the Consumer protection laws in Dade County.

2. To date my office has received over one hundred (100) complaints against the Defendant, Family Publications Service Inc. Most of these complaints deal with individuals who entered into a standard form contract with the defendant, and later sought to have it cancelled when they realized they had been falsely led to believe they were only paying for one magazine (Life) and get-

ting the others free. When in fact they were actually paying for the others as well.

3. I believe that if the defendant had made the proper disclosures as the defendant was required to do, under the TRUTH IN LENDING ACT (USC § 1601) and its regulations (Reg. Z) before the contract was consumated (Reg. Z, § 226.8), these individuals would never have signed the contract.

4. Defendant to my knowledge has never registered with the secretary of State of Florida as a foreign corporation, as required under the laws of Florida, but has continued to do business in Dade County for over two years. Defendant, Family Publications Services Inc. last office address was 123 N. W. 79th Street Miami, Florida. Out of this office they ran a collection office for people who had been misled and entered into contracts similar to that of the Plaintiff, Leila Mourning.

5. From our investigation we have learned that the defendant, Family Publications Services Inc., through its collection agents, would not let individuals cancel their contracts and used threatening and harassing tactics, in order to collect on these standard form contracts, which were similar to the one entered into by the plaintiff, Leila Mourning.

6. On July 29, 1970, in Criminal Court Dade County, Florida, The State of Florida, brought suit in Case Number 70-3686 before the Honorable Judge Murray Goodman, which was an action against the Defendant, Family Publications Services Inc. The defendant was charged with misleading advertising and then was convicted along with two of their employees. This standard form contract was a tool used in this deceptive trade practice and has caused damage to numerous individuals in Dade County. The court ordered the defendant, Family Publications Services Inc., to stop doing business in the state.

7. The Defendant, Family Publications Services Inc., is a Delaware Corporation owned solely by Time Inc. of New York, who publishes Time and Life magazines.

8. I believe that my office only receives a small percentage of the complaints made by consumers, who have been damaged in Dade County by the defendant through

their failure to make the disclosures that are required to be made by the defendant under the Truth in Lending Act and its regs. I believe that many people so damaged have not pursued their legal rights because of the small amount they can recover, and could not afford to bring their own suit; that a class action suit is the proper and only remedy to correct this wrong and I believe no private attorney would take this type of suit on an individual basis.

I therefore, urge that this Court permit the plaintiff to maintain her suit as a class action, thereby giving the consumer public of Dade County a measure of protection as intended by the Truth in Lending Act against those who prey on the ignorance of others.

/s/ John C. Mays
JOHN C. MAYS

SWORN to before me this 14th day of August 1970.

/s/ [Illegible]

Notary Public

Notary public, state of Florida at large
My commission expires Apr. 12, 1974
Bonded thru Fred W. Diestelhorst

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 70-559-CIV-WM

AFFIDAVIT OF NEIL ALFORD

LEILA MOURNING, PLAINTIFF

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

AFFIDAVIT IN SUPPORT TO CLASS ACTION DETERMINATION MOTION

STATE OF FLORIDA)
) ss.:
COUNTY OF DADE,)

I, NEIL ALFORD, being duly sworn, deposes and says:

I am a citizen of the United States over 21 years of age and a resident of Dade County, Florida. I am presently an inspector for the Consumer Protection Division of Metropolitan Dade County. I am fully familiar with the business practices of the Defendant, Family Publications Service, Inc. I, therefore, make this affidavit in support of the Plaintiff's motion that this Cause be maintained as a class action.

1. I compiled the list of complaints received by our office against Family Publications Service, Inc. (see Exhibit I). This is just a partial list of complaints received by this office against the Defendant.

2. The Defendant, Family Publications Service, Inc., had an office at 123 N. W. 79th Street, out of which their collecting agents worked. These agents were used to collect on contracts, similar to the one entered into by the Plaintiff. In order to collect, the Defendant's agents used threatening and harassing tactics, in order to force compliance with this standard form contract.

3. The complaints received by this office, were that the Defendant represented that the other magazines were free when the consumer purchased Life magazine, when in fact the total cost is much more than a subscription to Life for the five year period.

4. I believe from my investigation that had the Defendant informed the purchaser of the full contract price, the purchaser would not have entered into this contract with the Defendant.

5. I believe that there are numerous others who have been damaged by the Defendant's failure to disclose the information as is required by the Truth in Lending Act. That due to the small amount of recovery numerous individuals have not filed their own actions against the Defendant, Family Publications Service, Inc. I believe that if this suit is allowed to be maintained as a class action, many who have been damaged, will have a forum for their rights to be protected.

/s/ Neil Alford
NEIL ALFORD

SWORN before me this 14th day of August 1970.

/s/ [Illegible]

Notary public, state of Florida at large
My commission expires Apr. 12, 1974
Bonded thru Fred W. Diestelhorst

COMPLAINTS AGAINST FAMILY PUBLICATIONS SERVICE, INC. RECEIVED BY THE DADE COUNTY CONSUMER PROTECTION DIVISION

J. H. White	5925 S.W. 72 Avenue
Maude Reeves	2260 N.W. 27 Avenue
Josephine Calais	23300 S.W. 123 Avenue
Diane Taylor	18920 N.W. 8 Avenue
Ann Cullen	1021 N. Greenway Drive, Coral Gables
Franklin Renault	9650 S.W. 102 Avenue Road
Phyllis Greenfield	7700 S.W. 20 Street
B. Metzger	7200 N.W. 169 Terrace
Bernice Patti	18712 N.W. 10 Court
T. Freed	4410 N.W. 191 Terrace
A. B. Shavelson	541 Blue Heron Road, Hallendale, Florida
L. E. McAnally	26235 S.W. 193 Avenue
E. C. Mulrichill	1520 Fletcher Street, Hollywood, Florida
William Raab	7947 N.W. 11 Avenue
M. Newkoap	10541 N.W. 29 Court
Joseph Kloak	1121 Sunset Drive
J. Irio	210 Beacon Blvd.
Gerard Kouwenhoren	7600 N.E. 7 Avenue
Mary Kimbrough	266 Palermo, Coral Gables, Florida
J. Minsky	2360 N.W. 181 Terrace
Robert N. Jerguson	1820 Opa Locka Boulevard
J. Bricke	625 S.W. 3 Street, Hallendale, Florida
Vivien Helvenston	431 Tamiami Boulevard
Jim Dobbins	457 N.W. 57 Avenue, Apt. 23N
Ira Segal	8320 S.W. 92 Terrace
Harold T. Sigel	2431 S. W. 82 Avenue, Ft. Lauderdale, Florida
Carol Christenson	7400 Miami Lake Way, Apt. 263
Ouijano Justo	1000 S.W. 12 Court
Sharon Deckard	3565 N.W. 36 Street
Gregory H. Banks	Box 302, Homestead A.F.B.
John Randelman	7238 S.W. 94 Place, Apt. D4
R. Weathers	3309 Drew Street, Jacksonville, Fla.
Charles Rynn	24 Minorca, Apt. 6, Coral Gables
Leila Mourning	15295 Garfield Drive, Homestead
Mike Sementa	11970 N.E. 19 Drive, Apt. 2
Linda White	6536 S.W. 22 Street, Hollywood, Fla.

E. D. Davis	10849 S.W. 32 Street
A. Martinez	9211 S.W. 38 Street
Gloria Lupo	51 W. 19 Street, Hialeah, Florida
Jack Lopez	6760 S.W. 19 Street
C. H. Hunt	14540 N.W. 10 Avenue
Robert Jones	7080 Hood Street, Hollywood, Florida
Kenneth Stansky	1055 N.E. 123 Street
Selma Sanders	7305 Dickens Avenue, Miami Beach, Fla.
Mike Lemas	Replica Newspaper
Wilma Jirsa	13810 N.W. 5 Place
R. Robinson	6050 W. First Avenue
G. K. Rutberg	800 W. 58 Street
Mary Lee Montgomery	2775 W. Okeechobee Road
Sgt. L. F. Burgett	Public Safety Department
S. E. Watkins	2810 S.W. 120 Road
Gary Drutzer	11051 S.W. 200 Street
Blanca Ortega	8103 S.W. 13 Street
Sgt. James Ward, Jr.	1228 N.E. First Street, Homestead
R. Richmond	361 N.E. 175 Street
John Henderson	890 S.E. 3 Place
Dorothy M. Paterson	4272 Dandridge Street, Palm Beach Gardens
J. L. Shuster	9101 S.W. 16 Street
James Morford	1631 N.E. 171 Street
Justine Tune	7221 Bamboo Street
Robert Jenkins	7050 S.W. 19 Terrace
R. J. Bracci	11781 S.W. 27 Street
Myrtle M. Quick	11344 S.W. 2 Street
William Metcalf	2644 N.W. 22 Court
Susan Olson	11100 S.W. 92 Avenue
M. Gibson	11965 S.W. 188 Street
S. Rentscher	515 Caledonia, Coral Gables
Bessie Luves	1524 N.E. 181 Street
R. C. Andrews	4140 S.W. 98 Court
Daniel Prevost	777 N.E. 11 Street, Homestead
Loraine Orms	9855 S.W. 16 Street
Roll Harms	8490 N.W. 185 Street, Hialeah
Albert Michel	915 N.E. 177 Street
Riki Lieberman	5731 S.W. 4 Street
William Shough	17 Minorca, Coral Gables
Doris Kinkaid	4600 S.W. 115 Avenue
Steven Fisher	2179 N.E. 122 Street
W. J. Roberts, Jr.	5530 N.W. 173 Drive
Ben Cunningham	1234 S.W. 13 Avenue
W. Weiss	5161 Collins Avenue, Apt. 509
L. Bishop	560 W. 49 Street, Hialeah

Joseph Solaris	1220 S.W. 16 Avenue
H. Peters	7928 W. Drive, N. Bay Village, Apt. 704
Jack Foster	1481 N.W. 103 Street, Apt. 356E
Virginia Heath	1918 S.W. 3 Avenue
C. Whitehill	3220 S.W. 97 Court
Jose F. Martinez	262 S.W. 27 Road
Walter Alexandrow	9010 S.W. 197 Street
L. Langer	1370 S.W. 16 Street
Helen Cosby	198 N.W. 46 Avenue, Apt. 23
Fred Wendelkin	11880 S.W. 35 Terrace
Norma Matthews	7205 S.W. 21 Terrace

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No: 70-559-Civ-WM

Filed November 27, 1970

LEILA MOURNING, on behalf of herself and all those similarly situated, PLAINTIFFS

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT

AMENDED ORDER GRANTING FINAL SUMMARY JUDGMENT TO PLAINTIFF, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CLASS ACTION CLAIM

THIS CAUSE came on to be heard upon the Defendant's motion to amend this Court's Order and judgment entered October 30, 1970, and the Court having heard argument of counsel, and having considered the memoranda submitted by counsel for the parties, and being otherwise fully advised in the premises,

The Court finds that the Plaintiff, LEILA MOURNING, cannot fairly and adequately protect the interests of the alleged class in this cause, and any previous order herein to the contrary is superceded by this Order and Judgment, and it is therefore,

ORDERED AND ADJUDGED that this action shall not be maintained as a class action, and the class action claim

of the "second amended complaint" is hereby dismissed, and it is further,

ORDERED AND ADJUDGED that this Court's Order of October 30, 1970, be and it is hereby vacated and amended to state as follows:

THIS CAUSE having come on before me upon Motions for Summary Judgment filed by the parties, Philip L. Coller, Esq. of the Legal Services Senior Citizens Center, and M. Donald Drescher, Esq., appearing for the Plaintiff, and Peter Fay, Esq. of Frates Fay Floyd & Pearson, P.A., appearing for the Defendant, and the Court having heard argument of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This action is founded on the Consumer Credit Protection Act (Title I, Truth in Lending Act) 15 USC § 1601 et seq., and the Regulations duly promulgated thereunder by the Board of Governors of the Federal Reserve System (Regulation Z, 12 CFR §§ 226.1-226.12). The relief sought is recovery of a civil penalty imposed by the Act for failure to make disclosures required by the Act and its Regulations.

There is no issue as to any material fact. Defendant admits (1) that it entered into a written standard form contract with the named Plaintiff and other members of this class; and (2) that the standard form contract did not contain the disclosures specified by the Truth in Lending Act. Further, Defendant admits contacting the named Plaintiff on several occasions subsequent to the filing of this suit to enforce collection of a debt asserted by Defendant against the Plaintiff. Defendant is engaged in the interstate business of soliciting subscriptions to magazines and offering contracts therefor. The contract on its face provides that the customer agrees to pay a stated sum over a period of 24 or 30 months, that it is non-cancellable and that "Payments due monthly, otherwise entire balance due."

Plaintiff Leila Mourning entered into a standard form contract with the Defendant on August 19, 1969. Subsequent to July 1, 1969, the date the Act went into effect, a number of other individuals in Dade County entered into identical or similar contracts with the Defendant.

The sole question presented is: "Does the transaction here sued upon come within the scope of the Truth in Lending Act and the Regulations duly promulgated thereunder?"

CONCLUSIONS OF LAW

A. The Truth in Lending Act and the Regulations must be interpreted so as to be consistent with each other and with the declared Congressional purpose of the Act—"to assure meaningful disclosure of credit terms."

B. The uncontroverted evidence before the Court plainly demonstrates that it is the intent of the Regulation and the interpretation of the Federal Reserve Board and of the staff of the Federal Trade Commission that the transaction here in question falls squarely within the scope of the Act and its Regulations by virtue of the "more than four installments" rule, 12 CFR § 226.2(k); F.R.B. Letter, July 24, 1969, 1 CCH, *Consumer Credit Guide*, §§ 30,113,114; FTC Letter, September 3, 1970 (in Court file); *CLE, TRUTH IN LENDING IN FLORIDA*, Chapter 2.2(D); *Tanner, Truth in Lending and Regulation Z—A Primer*, 6 Ga. S.B.J. 1 (Aug. 1969).

C. The uncontroverted facts show that Consumer credit was extended by the Defendant to the Plaintiff. The Plaintiff received a present contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments. The promise to pay is unconditional and non-cancellable, and, further, the written agreement provides that "Payments due monthly, otherwise entire balance due." The evidence before the Court regarding the named Plaintiff reveals that the Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff.

D. No constitutional question is presented by the case at bar.

E. The answer to the question presented to the Court must be "yes," and since the Defendant has extended "Consumer credit" within the meaning of the Truth in Lending Act and its Regulations and has failed to make the material disclosures required by 15 USC § 1631 and 12 CFR § 226.8, the Defendant is liable to the Plaintiff for the penalties imposed by 15 USC § 1640(a).

Accordingly, it is ORDERED AND ADJUDICATED:

1. That the motion of Plaintiff, LEILA MOURNING, for summary judgment be and the same is granted and the Defendant's motion for summary judgment is denied.

2. That as a penalty for its failure to provide the disclosures required by the Act and its Regulations, the Defendant shall pay to the Plaintiff, LEILA MOURNING, the sum of One Hundred Dollars ($100.00).

3. That the Clerk of this Court shall enter final judgment in favor of Plaintiff, LEILA MOURNING, against the Defendant, FAMILY PUBLICATIONS SERVICE, INC., in the amount of One Hundred Dollars ($100.00), plus 1500.00 on behalf of Plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the costs of this action.

DONE AND ORDERED in Chambers at Miami, Florida, on this 27th day of November, 1970.

/s/ W. Mehrtens
W. MEHRTENS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action File No. 70-559-Civ-WM

Filed November 27, 1970

[Title Omitted]

Judgment

This action came on for hearing before the Court, Honorable William O. Mehrtens, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, that the motion of plaintiff, LEILA MOURNING, for summary judgment is GRANTED and defendant's motion for summary judgment is DENIED.

It is Ordered and Adjudged that the plaintiff, LEILA MOURNING, recover from the defendant, FAMILY PUBLICATIONS SERVICE, INC., the sum of One Hundred and 00/00 Dollars ($100.00), plus One Thousand Five Hundred and 00/00 Dollars ($1500.00) on behalf of plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the cost of this action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO: 70-559-Civ-WM

[TITLE OMITTED]

Filed December 11, 1970

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that FAMILY PUBLICATIONS SERVICE, INC., Defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Amended Order Granting Final Summary Judgment to Plaintiff and Denying Defendant's Motion for Summary Judgment, and Judgment for Plaintiff, LEILA MOURNING, against Defendant, FAMILY PUBLICATIONS SERVICE, INC., entered in this action on the 27th day of November, 1970.

DATED at Miami, Florida, on this 11 day of December, 1970.

FRATES FLOYD PEARSON & STEWART
Attorneys for Defendant
12th Floor, Concord Building
Miami, Florida 33130

By /s/ L. Edward McClellan Jr.

FEDERAL TRADE COMMISSION

Washington, D.C. 20580

Bureau of
Consumer Protection

Sept 3 1970

Mr. Phillip L. Coller
Attorney at Law
Legal Service Senior Citizens Center
Suite 309, Harvey Building
1370 Washington Avenue
Miami Beach, Florida 33139

Dear Mr. Coller:

This is in response to your letter of August 31, 1970, inquiring as to whether a seller who, by agreement, allows payment in 36 monthly instalments but imposes no finance charge, is a "creditor" under the Truth in Lending Act. You also noted the seller's claim that because the service extends over six years and is repayable in three there is no credit extended.

Your question brings to light an apparent inconsistency involving the definition of creditor provided by the Statute and that provided by Regulation Z, the implementing Regulation of the Act. Section 103 of the Statute states that "the term creditor refers only to creditors who regularly extend . . . credit for which the payment of a finance charge is required . . .". Section 226.2(m) of Regulation Z defines "creditor" as "a person who in the ordinary course of business regularly extends . . . consumer credit . . .". "Consumer credit" is defined by Section 226.2(k), in part, as "credit offered or extended to a natural person . . . for which *either* a finance charge is or may be imposed *or which, pursuant to an agreement, is or may be payable in more than 4 instalments*" (emphasis supplied).

Section 105 of the Statute delegates authority to the Board of Governors of the Federal Reserve Board to prescribe regulations to carry out the purposes of the Act.

It further states that "these regulations may contain such classifications, differentiations, or other provision... as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith". It is the unanimous opinion of the staff that the "more than four instalments" provision of the Regulation is in furtherance of those purposes and that a seller who allows payment in more than four instalments comes within the scope of the Truth in Lending Act and its Regulation, notwithstanding the absence of a finance charge.

The seller's contention that because the charges for three of the six years of service are prepaid there is no credit extended is wholly without merit. As long as the seller, by agreement, allows the purchaser to defer payment of the debt over more than four instalments he is extending consumer credit.

The above comments constitute informal staff opinion which is advisory in nature and is in no way binding upon the Commission.

Your inquiry is appreciated.

Very truly yours,

/s/ Lewis H. Goldfarb,
Lewis H. Goldfarb,
Attorney,
Division of Special Projects.

cc: Mr. John B. White,
Attorney in Charge,
Federal Trade Commission,
730 Peachtree Street, N.E.,
Room 720,
Atlanta, Georgia. 30303

Opinion of United States Court of Appeals For the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1150

LEILA MOURNING, ET AL., PLAINTIFFS-APPELLEES

v.

FAMILY PUBLICATIONS SERVICE, INC.,
DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 27, 1971)

Before

COLEMAN, SIMPSON, and RONEY,
Circuit Judges.

COLEMAN, Circuit Judge: The validity of Regulation Z,[1] promulgated by the Federal Reserve Board under the Truth-In-Lending Act,[2] is the material issue in this appeal. The District Court held for validity. We reverse.

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[1] 12 C.F.R. 226.

[2] 15 U.S.C., § 1601, et seq.

I

The Facts

Appellant, Family Publications Service, Inc., is a Delaware Corporation engaged in the interstate business of soliciting subscriptions and offering contracts for the sale and delivery of a large number of well known periodicals.

The appellee Leila Mourning, is a seventy-three year old widow having her domicile in Dade County, Florida.

Under appellant's method of conducting its business for the sale and delivery of well known periodicals, the customer under a standard form contract agrees to receive his particular magazine selections for 48 (or 60) months and to pay for them over the first 24 (or 30) months. Under normal operating circumstances, the appellant expects to receive a prepayment for magazines to be delivered to the customer in the future. The only circumstances in which magazines are occasionally delivered prior to appellant's receipt of payment for them is when a customer defaults in making the prepayment. According to the appellant, these transactions, contractual in nature, for the sale and delivery of magazines do not involve the extension of credit as defined by the Truth-In-Lending Act or the imposition of a finance charge, either directly or indirectly, requiring the disclosures specified in the Truth-In-Lending Act.

On August 19, 1969, appellee entered into a written contract with the appellant for the purchase of the *Ladies Home Journal*, *Holiday*, *Life*, and *Travel and Camera*. As usual, the standard form contract required the appellee to make thirty monthly payments of $3.95 each, in return for which she would receive magazines for sixty months. The contract provided that it was non-cancellable and that failure to make the monthly payments would result in the entire balance becoming due. Said contract is the only instrument executed and existing between the parties and it does not contain a disclosure as to the total purchase price, finance charges, service charges, or the amount to be financed.

Although Leila Mourning, the appellee, received the magazines ordered, she defaulted on her contract and

never made any payments beyond the initial $8.95. Consequently, her contract was cancelled by Family Publications Service, Inc., on April 15, 1970. Appellant admits contacting the named appellee on several occasions seeking to enforce the contract. In those letters, appellant explained that it had already entered her subscriptions for the entire period; that it was a financier which had fully invested in her contract and would not receive a refund from the publishers; that Mrs. Mourning would have had to pay in advance had she dealt directly with the publishers; that she had an obligation to repay appellant on her "credit" account, much the same as if she had purchased any other type of merchandise; and that the entire balance of $118.50 was due.

On April 23, 1970, Mrs. Mourning filed her civil suit asserting that the appellant, Family Publications Service, Inc., had failed to make the disclosures required by the Truth-In-Lending Act and, on that basis seeking the civil penalty, including the attorney's fees, prescribed by the Act.

II

The Decision of the District Court

Both Mrs. Mourning and Family Publications, Inc. moved for summary judgment. The judgment went to the plaintiff, in the following language:

> "This Cause having come on before me upon Motions for Summary Judgment filed by the parties, Philip L. Coller, Esq. of the Legal Services Senior Citizens Center, and M. Donald Drescher, Esq., appearing for the Plaintiff, and Peter Fay, Esq. of Frates Fay Floyd & Pearson, P.A., appearing for the Defendant, and the Court having heard argument of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

"This action is founded on the Consumer Credit Protection Act (Title I, Truth in Lending Act) 15 USC § 1601 et seq., and the Regulations duly promulgated thereunder by the Board of Governors of the Federal Reserve System (Regulation Z, 12 CFR §§ 226.1-226.12). The relief sought is recovery of a civil penalty imposed by the Act for failure to make disclosures required by the Act and its Regulations.

"There is no issue as to any material fact. Defendant admits (1) that it entered into a written standard form contract with the named Plaintiff and other members of this class; and (2) that the standard form contract did not contain the disclosures specified by the Truth in Lending Act. Further, Defendant admits contacting the named Plaintiff on several occasions subsequent to the filing of this suit to enforce collection of a debt asserted by Defendant against the Plaintiff. Defendant is engaged in the interstate business of soliciting subscriptions to magazines and offering contracts therefor. The contract on its face provides that the customer agrees to pay a stated sum over a period of 24 or 30 months, that it is non-cancellable and that 'Payments due monthly, otherwise entire balance due'.

"Plaintiff Leila Mourning entered into a standard form contract with the Defendant on August 19, 1969. Subsequent to July 1, 1969, the date the Act went into effect, a number of other individuals in Dade County entered into identical or similar contracts with the Defendant.

"The sole question presented is: 'Does the transaction here sued upon come within the scope of the Truth in Lending Act and the Regulations duly promulgated thereunder?'

Conclusions of Law

"A. The Truth in Lending Act and the Regulations must be interpreted so as to be consistent with each other and with the declared Congressional pur-

pose of the Act—'to assure meaningful disclosure of credit terms.'

"B. The uncontroverted evidence before the Court plainly demonstrates that it is the intent of the Regulation and the interpretation of the Federal Reserve Board and of the staff of the Federal Trade Commission that the transaction here in question falls squarely within the scope of the Act and its Regulations by virtue of the 'more than four installments' rule, 12 CFR § 226.2(k); F.R.B. Letter, July 24, 1969, 1 CCH, *Consumer Credit Guide*, §§ 30,113, 30,114; FTC Letter, September 3, 1970 (in Court file); *CLE, TRUTH IN LENDING IN FLORIDA*, Chapter 2.2 (D) *Tanner, Truth in Lending and Regulation Z—A Primer*, 6 Ga. S.B.J. 1 (Aug. 1969).

"C. The uncontroverted facts show that Consumer credit was extended by the Defendant to the Plaintiff. The Plaintiff received a present contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments. The promise to pay is unconditional and non-cancellable, and, further, the written agreement provides that 'Payments due monthly, otherwise entire balance due'. The evidence before the Court regarding the named Plaintiff reveals that the Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff.

"D. No constitutional question is presented by the case at bar.

"E. The answer to the question presented to the Court must be 'yes,' and since the Defendant has extended 'Consumer credit' within the meaning of the Truth in Lending Act and its Regulations and has failed to make the material disclosures required by 15 USC § 1631 and 12 CFR § 226.8, the Defendant is liable to the Plaintiff for the penalties imposed by 15 USC § 1640(a).

"Accordingly, it is ORDERED AND ADJUDICATED:

"1. That the motion of Plaintiff, LEILA MOURNING, for summary judgment be and the same is

granted and the Defendant's motion for summary judgment is denied.

"2. That as a penalty for its failure to provide the disclosures required by the Act and its Regulations, the Defendant shall pay to the Plaintiff, LEILA MOURNING, the sum of One Hundred Dollars ($100.00).

"3. That the Clerk of this Court shall enter final judgment in favor of Plaintiff, LEILA MOURNING, against the Defendant, FAMILY PUBLICATION SERVICE, INC., in the amount of One Hundred Dollars ($100.00), plus 1500.00 on behalf of Plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the costs of this action."

We have included the Findings and Conclusions because they reveal the absence of any finding that a finance charge was involved in this transaction. The defendant's answer denied the existence of such a charge, and the plaintiff did not traverse it. The long and the short of it is that the plaintiff and the court stood on the Regulation.

III

The Truth-In-Lending Act, Its Statutory Scheme, and Regulation Z

Recognizing that the full disclosure of finance charges would greatly aid consumers in deciding for themselves the reasonableness of the credit charges imposed and would thereby enable consumers to effectively shop for credit, the Truth-In-Lending Act, Title I of the Consumer Credit Protection Act, Public Law 90-321, 82 Stat. 146, was enacted by the Congress, establishing the statutory requirement that as a matter of fair play to the consumers the cost of credit should be disclosed fully, simply, and clearly. United States Code Congressional and Administrative News, 90th Congress, Second Session (1968), pp. 1962, 1965. It was the feeling of the Congress that "the informed use of credit results from

an awareness of the cost thereof by consumers". 15 U.S.C., § 1601.

The basic thrust of the Truth-In-Lending Act is that each creditor who regularly extends, or arranges for his debtors in consumer transactions to defer payment of debt or to incur debt and defer its payment and who *thereby as an incident to such extension or arrangement for the deferred payment of debt imposes either directly or indirectly a finance charge for such deferred debt*, shall disclose clearly and conspicuously, in accordance with the regulations of the Board of Governors of the Federal Reserve System, to each person to whom such right of deferred payment of debt is granted and upon which right a finance charge is or may be imposed, the information required by 15 U.S.C., § 1638(a), 15 U.S.C., § 1602(e) and (f), § 1605(a), § 1631(a). According to such section, 15 U.S.C., § 1638(a), in any consumer transaction, not under an open end credit plan, where the debtor is granted the right to defer payment of debt or to incur debt and defer its payment, *and for which right the payment of a finance charge is required of the debtor by the creditor*, the creditor shall disclose each of the following items:

1. The cash price of the item purchase, 15 U.S.C., § 1638(a)(1).
2. The amount of the down payment, 15 U.S.C., § 1638(a)(2).
3. The difference between the cash price of the item purchased and the amount of the down payment, 15 U.S.C., § 1638(a)(3).
4. All additional charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge, 15 U.S.C., § 1638(a)(4).
5. The total amount to be financed (the sum of #3 and #4), 15 U.S.C., § 1638(a)(5).
6. Amount of the finance charge, 15 U.S.C., § 1638(a)(6).
7. The annual percentage rate of the finance charge, 15 U.S.C., § 1638(a)(7).

8. The schedule of payments required, 15 U.S.C., § 1638(a) (8).
9. The charges for late payments, 15 U.S.C., § 1638 (a) (9).
10. A description of any security interest involved, 15 U.S.C., § 1638(a) (10).

In order to assure the effective operation of the statutory provisions of the Act and to assure the meaningful disclosures of credit terms so that all consumers would be able to compare more readily the various credit terms available and thereby avoid the uninformed use of credit, the Act delegated to the Board of Governors of the Federal Reserve System the authority to promulgate regulations to accomplish the above-mentioned objectives, 15 U.S.C., § 1604. This section expressly authorized the Board of Governors to promulgate regulations containing such classifications, differentiations, or other provisions, and providing for such adjustments and exceptions for any class of transactions, as in the judgment of the Board of Governors are necessary or proper to effectively effectuate the purposes of the Truth-In-Lending Act, to prevent the circumvention or evasion of such statutory provisions, or to facilitate compliance with such provisions. In connection with the Truth-In-Lending Act's delegation of authority to promulgate regulations, the Act provided that any reference in the Act to requirements imposed by the Act included reference to the Board of Governor's regulations, 15 U.S.C., § 1602 (k).

In addition to the specification in the Truth-In-Lending Act of criminal penalties for the wilful and knowing failure of a creditor to make the required disclosures of 15 U.S.C., § 1638(a), or for failing to comply with any other requirements of the Act, 15 U.S.C., § 1611, the Act established two methods of civil enforcement. One is administrative in nature and is vested (1) in a number of federal agencies which already exercised jurisdiction by virtue of other statutory authority, over particular classes of creditors, 15 U.S.C., § 1607(a), and (2) in the Federal Trade Commission with respect to all other creditors, 15 U.S.C. § 1607(c).

The other civil remedy established by Congress was made available directly to consumers. Specifically, the Act established federal court jurisdiction over actions for a civil penalty and authorized the courts, in successful actions, to award the consumer a reasonable attorneys' fee, 15 U.S.C., § 1640(a) and (e). The amount of the civil penalty was set at "an amount equal to the sum of *twice the amount of the finance charge in connection with the transaction*", except that the penalty could not be less than $100 nor greater than $1,000, 15 U.S.C., § 1640(a).

The Four Installment Rule of Regulation Z

On February 10, 1969, the Board of Governors of the Federal Reserve System implemented the Act by promulgating a set of regulations dealing comprehensively and thoroughly with all aspects of the Truth-In-Lending Act.

Within these regulations there was included a provision that the Board of Governors of the Federal Reserve System determined that the Act's disclosure requirements would be applied not only to those creditors who extend consumer credit which involves an expressly stated finance charge, *but also those who extend consumer credit for which no finance charge is stated but which pursuant to agreement, is or may be payable in more than four installments.*

The purpose, indeed the inescapable result of the Regulation, is the imposition of a conclusive presumption that those who extend credit and permit payment in four or more installments have added a finance charge for the extension of credit.

The primary question, then, is: Was such a requirement within the delegated authority of the Board?

IV

Our Decision

As already stated, the Act requires that "each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a

finance charge is or may be imposed, the information required under 15 U.S.C., § 1638(a)." 15 U.S.C., § 1631 (a). For failure in connection with any consumer credit transaction to disclose to any person required by 15 U.S.C., § 1638(a), the Truth-In-Lending Act imposes on such creditor civil liability, 15 U.S.C., § 1640, and in cases of wilful and knowing violation of the disclosure requirement, criminal liability, 15 U.S.C., § 1611. This particular action was brought under the civil liability provisions.

Mindful of the Supreme Court's decision in *Federal Communication Commission v. American Broadcasting Company*, 347 U.S. 284, 290 (1954), that penal statutes are to be strictly construed, and mindful that it is the duty of the judiciary to finally determine the proper construction of statutes, this Court construes 15 U.S.C., § 1631 to require that three essential elements must be found present together in a transaction before a person is obligated under the Truth-In-Lending Act to make the information disclosures listed in 15 U.S.C., § 1638(a). These three essential elements consist of the following:

First, there must be found present a *creditor* as defined by the Act, or a person who regularly extends or arranges for the extension of the right to defer payment of debt, or to incur debt and defer its payment, and for which right of deferred payment the payment of a finance charge is required, 15 U.S.C., § 1602(e) and (f).

Secondly, there must be found present a *consumer credit* transaction as defined by the Act, or a transaction in which the person to whom is extended the right to defer payment of debt or to incur debt and defer its payment is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household or agricultural purposes, 15 U.S.C., § 1602(e) and (h).

Thirdly, there must be found present a "*finance charge*" as defined by the Act, 15 U.S.C., § 1605(a), and § 1602 (e) and (f).

Regulation Z provides:

> "Consumer credit means credit offered or extended to a natural person, in which the money, property,

> or service which is subject of the transaction is primarily for personal, family, household, or agricultural purposes for which either a finance charge is or may be imposed or which, pursuant to an agreement, is or may be payable in more than four installments."

According to the brief of the United States as amicus curiae, the four installment rule in effect establishes a conclusive presumption that those who extend credit and allow payment in four or more payments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they purport not to levy a finance charge. Therefore, we can conclude from the Regulation promulgated by the Board of Governors of the Federal Reserve System, from the decision of the lower district court, and from the brief filed in this cause by the United States as amicus curiae, that in order for the disclosure and penalty provisions of the Truth-In-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required. The presence of a finance charge is conclusively presumed from the nature of the transaction, involving payment in more than four installments.

It can be readily seen from a consideration of the four installment rule of Regulation Z as defined by the appellee and from a consideration of this Court's construction of the statutory provisions of the Truth-In-Lending Act that an inconsistency exists between the four installment rule and the Truth-In-Lending Act. On the one hand, the four installment rule requires the application of the disclosure and penalty provisions of the Truth-In-Lending Act to transactions involving the extension of credit which, pursuant to agreement, is or may be payable in more than four installments, *whether or not a finance charge is proven to have been imposed*, directly or indirectly, as an incident to the extension of credit. On the other hand, the statutory provisions of the Truth-

In-Lending Act requires that a finance charge must be found present, directly or indirectly, along with the other two essential elements in a transaction before such transaction is considered to be subject to the penalty and disclosure provisions of the Truth-In-Lending Act.

By extending the applicability of the disclosure and penalty provisions of the Truth-In-Lending Act to transactions involving the extension of credit repayable by agreement in more than four installments, whether or not there is found in such transactions the imposition of a finance charge as an incident to the extension of credit, the Board of Governors, in our opinion, over-stepped the authority granted to them under 15 U.S.C., § 1604. The authority delegated to the Board of Governors to prescribe such regulations as they deem necessary and proper to further the purposes of the Act and to prevent the circumvention of the Act did not include the authority to make subject to the disclosure and penalty provisions of the Act transactions not involving the imposition of a finance charge, and therefore not covered within the scope of the Act.

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of the Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity", *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528 (1935).

We therefore hold that the four installment rule of Regulation Z constituted an administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment. The effect of such an effort comes within the condemnation of decisions of the Supreme Court. This condemnation is exemplified by *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87, 80 S.Ct. 144, 4 L.Ed.2d 127 (1959), where the Court stated:

"But the section contains nothing to that effect, and therefore, to uphold this addition to the tax would be to hold that it may be imposed by regulation, which, of course, the law does not permit. *United States* v. *Calamaro*, 354 U.S. 351, 359; *Koshland* v. *Helvering*, 298 U.S. 441, 446, 447; *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 134."

Equally applicable to the above holdings of the United States in this Court's opinion in *United States* v. *Marett*, 5 Cir., 1963, 325 F.2d 28, 30, 31.

As previously noted, the four installment rule of Regulation Z which decrees that those who extend credit and permit payment in more than four installments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they purport not to levy a finance charge, creates a conclusive or irrebuttable presumption. Such a presumption states a rule of substantive law. This is in contrast to a rebuttable presumption which only states a rule of evidence and which the opposing party is entitled to overcome by proof. The Supreme Court has held that a statute which creates a conclusive presumption contravenes the Fourteenth Amendment, if enacted by the State Legislature. It violates the Fifth Amendment if enacted by the Congress.

In *Schlesinger* v. *State of Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926), the Supreme Court struck down as violative of the Fourteenth Amendment a statute of the State of Wisconsin which provided in effect that gifts of a decedent estate made within six years of death were made in contemplation thereof. The Court, 270 U.S., at page 239, 46 S.Ct., at page 261, stated:

"The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within 6 years of death were made in anticipation of it and to lay a graduated tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."

In *Heiner* v. *Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), the Court likewise struck down a Congressional enactment which created a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death, on the ground that the provision violated the Fifth Amendment of the Constitution. The Court pointed out, 285 U.S., at page 324, 52 S.Ct., at page 360, that Congress had the power to create a rebuttable presumption, and stated:

> "But the presumption here created is next of the kind. It is made definitely conclusive, incapable of being overcome by proof of the most positive character."

And further the Court stated, 285 U.S., at page 329, 52 S.Ct., at page 362:

> "THIS court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment."

It thus appears that Congress itself would have been without power to create the conclusive presumption which the Board of Governors seeks to accomplish in the four installment rule. It is then even more certain that an administrative agency is without authority to promulgate such a regulation. Therefore, we conclude that the four installment rule, as promulgated by an agency of the Federal Government is void because it violates the Fifth Amendment to the Constitution. Although Regulation Z was designed by the Board of Governors to prevent circumvention of the Act and to facilitate the purposes of the Act, in its present language it exceeded the authority delegated, or which could have been delegated, to the Board and is, as presently written, void. This necessitates the reversal of the judgment below.

We further point out that since this transaction carried with it no finance charge, or cost of credit, it was without the scope of the Act, leaving aside the matter of Regulation Z, 15 U.S.C., § 1602(e) and (f).

The judgment of the District Court is reversed and remanded with directions that the complaint be dismissed.

REVERSED and REMANDED With Directions.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1150

D. C. Docket No. Civ. 70-559-WM

LEILA MOURNING, ET AL, PLAINTIFFS-APPELLEES

v.

FAMILY PUBLICATIONS SERVICE, INC., DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Florida

Before COLEMAN, SIMPSON and RONEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions that the complaint be dismissed.

September 27, 1971

Issued As Mandate: Oct 19 1971

SUPREME COURT OF THE UNITED STATES

No. 71-829

LEILA MOURNING, PETITIONER

v.

FAMILY PUBLICATIONS SERVICE, INC.

ORDER ALLOWING CERTIORARI. Filed March 20, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 471620 16

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-829

LEILA MOURNING,

Petitioner,

vs.

FAMILY PUBLICATIONS SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1971

No. ....

Leila Mourning,

Petitioner,

vs.

Family Publications Service, Inc.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Leila Mourning, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 27, 1971.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, p. 6a. The opinion of the District Court for the Southern District of Florida, which is not reported, appears in the Appendix hereto, p. 1a.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1971, and appears in

the Appendix hereto, p. 24a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Federal Reserve Board acted within its statutory authority when it promulgated 12 C.F.R. §226.2 (k), defining "consumer credit" covered by the Consumer Credit Protection Act to include any credit payable in more than four installments?

2. Whether the Federal Reserve Board acted consistent with the Fifth Amendment when it promulgated 12 C.F.R. §226.2(k), defining "consumer credit" covered by the Consumer Credit Protection Act to include any credit payable in more than four installments?

Statutory Provisions and Regulations Involved

United States Code, Title 15, §1601, 82 Stat. 146 (1968):

> §1601. Congressional findings and declaration of purpose
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

United States Code, Title 15, §1602(e), 82 Stat. 146:

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

United States Code, Title 15, §1602(f), 82 Stat. 146:

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this title shall apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

United States Code, Title 15, §1602(g), 82 Stat. 146 (1968):

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

United States Code, Title 15, §1604, 82 Stat. 148 (1968):

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and

exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

United States Code, Title 15, §1631, 82 Stat. 152 (1968):

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

United States Code, Title 15, §1638(a), 82 Stat. 156 (1968):

§1638. Sales not under open end credit plans—Required disclosures by creditor

(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay, the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

12 C.F.R. §226.2(k):

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agri-

cultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."

12 C.F.R. §226.2(l):

(l) "Credit" means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

12 C.F.R. §226.2(m):

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

Statement of the Case

Petitioner is a seventy-three year old widow residing in Dade County, Florida. On August 19, 1969, she entered into a contract with the Family Publications Service, Inc., (hereinafter "FPS"), a Delaware corporation engaged in interstate commerce, for the purchase of certain magazines. The contract was the result of a telephone solicitation made to petitioner followed up by a solicitation at her home. Petitioner made an initial payment of $3.95, and contracted to pay an equal amount monthly for a period of thirty months. FPS agreed that petitioner would receive 4 magazines for a period of sixty months.

The contract, made on a standard printed form supplied by FPS, did not disclose to petitioner the total purchase

price of the magazines—$122.45. Nor did it disclose the balance due after the initial payment, $118.50, or reveal other information or use terminology required by the Consumer Credit Protection Act, 15 U.S.C. §§1601 *et seq.* Petitioner was required to state in writing information normally used in a credit check, such as her occupation and business address, and an agent of FPS wrote on the contract "Own 4 years", apparently indicating the period time which petitioner had owned her home.

The sale of magazine subscriptions under similar circumstances is agreed to be FPS's sole business and source of income. FPS contracts with the magazine publishers to supply magazines directly to its customers, and FPS periodically reimburses the publishers out of the payments received from subscribers. What portion of a subscriber's payments are paid to the publishers and what portion retained by FPS is not disclosed by the record.

Shortly after entering into this contract petitioner, apparently realizing for the first time the large amount of money involved, refused to make further payments. Thereafter petitioner received at least five dunning letters from FPS demanding at first a resumption of monthly payments and then payment of the full $118.50 balance. The letters stressed that petitioner had "a credit account", warned of the "embarrassment" of having her name appear on a "monthly delinquent report", and threatened "expensive and unpleasant" legal action.

On April 23, 1970, petitioner, then represented by the Legal Services Senior Citizens Center, brought this action in the United States District Court for Southern District of Florida alleging that the contract violated the Consumer Credit Protection Act. Jurisdiction of the District Court was invoked under 15 U.S.C. §1640(e) providing for federal jurisdiction of actions arising under the Act. Petitioner de-

manded $100 in statutory damages, legal fees, and costs.* FPS urged, inter alia, that it was not required to make any disclosures because the transaction with petitioner did not involve a finance charge and was thus not covered by the Act. Petitioner maintained that she was not required to prove that the $122.45 total cost included a hidden finance charge because the applicable regulation, 15 C.F.R. §226.2 (k), required disclosure whenever, as here, the contract was payable in four or more instalments.

In connection with the proceedings in the District Court petitioner filed affidavits of the Director and an Inspector of the Consumer Protection Division of Metropolitan Dade County. The affidavits stated that the Consumer Protection Division had received over 100 complaints about FPS's practices, that to entice potential subscribers FPS falsely represented it was giving away free 5 year subscriptions to "Life" magazine, that those entering into contracts with FPS would not have done so had they known the full contract price, that FPS refused to permit subscribers to cancel contracts and used threatening and harassing tactics to enforce them. The affidavit of the Director further states that on July 29, 1970, defendant and two of its employees were convicted in Dade County Criminal Court of misleading advertising and that FPS was ordered to cease doing business in the State of Florida.

On November 27, 1970, the District Court held that the four instalment rule set out in section 226.2(k) was valid and applicable to the facts of this case, and granted petitioner's motion for summary judgment for $100 statutory damages plus costs and a reasonable attorney's fee. On September 27, 1971, the Court of Appeals reversed on the

* The action was originally denoted a class action. The District Court denied class action treatment, and petitioner did not appeal from that decision.

sole ground that the four instalment rule contained in Regulation §226.2(k) was invalid and that FPS was therefore not required to make any disclosures.

Reasons for Granting the Writ

Title I of the Consumer Credit Protection Act, also known as the Truth in Lending Act, was enacted in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601. The Act requires certain specified disclosures to be made in all credit contracts, authorizes the Federal Reserve Board to prescribe regulations under the Act, and provides for enforcement by a variety of administrative agencies and by private litigation. The decision of the Fifth Circuit invalidated a major regulation which the Federal Reserve Board has found to be essential to prevent circumvention of the Act. The Fifth Circuit's erroneously constricted view of the Board's rule making authority threatens the continued vitality of the Act, is in direct conflict with the well reasoned decision in *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100 (N.D. Ill. 1971), and has brought about serious uncertainty as to the legal obligations of thousands of creditors which only this Court can resolve.

The only issue in this case is whether the transaction between petitioner and FPS is the type of transaction in which disclosures are legally required. FPS concedes that it did not disclose to petitioner the total purchase price of the magazines or several other items of information required in transactions falling under the Act and regulations. While the delineation of the types of transactions subject to disclosure requirements depends on several definitions,

statutory provisions and regulations, the instant petition concerns regulation §226.2(k). That regulation provides in pertinent part:

> "Consumer credit" means credit . . . for which a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 installments . . . .

The District Court, in granting petitioner's motion for summary judgment, concluded that consumer credit was involved because the transaction involved 30 installments and thus fell under the second clause quoted, known as the four installment rule. The District Court did not consider whether the transaction might also involve consumer credit because of the presence of a finance charge.

The Court of Appeals reversed the judgment for petitioner below on the sole ground that the four installment rule on which the District Court had relied was invalid. The Court of Appeals reasoned that, since the definition of a "creditor" in the statute, 15 U.S.C. §1602(f), includes only creditors extending credit for a finance charge, the Act could only be applied to creditors who were proven to have imposed a finance charge in each particular case. The Court concluded that the four installment rule purported to require disclosures in cases not involving finance charges and was therefore outside the authority of the Board and involved an unconstitutional conclusive presumption that a finance charge was present in every transaction involving more than four installments. (See pp. 16a-23a). The decision of the Fifth Circuit is in direct conflict with that more than four months earlier in a case involving virtually identical facts, *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100 (N.D.Ill. 1971).* The Court of

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* *Strompolos* is now on appeal before the Seventh Circuit Court of Appeals.

Appeals, however, neither mentioned *Strompolos* nor purported to consider the detailed reasoning given therein for upholding the validity of regulation §226.2(k).

Assuming, *arguendo*, that Title I of the Consumer Credit Protection Act is concerned primarily with disclosures in transactions involving finance charges, the four installment rule embodied in §226.2(k) is nonetheless well within the statutory authority of the Board.

The four installment rule is founded upon an explicit and reiterated finding by the Federal Reserve Board that such a rule is essential to prevent wholesale evasion of the Act. In an opinion letter issued eight days after the regulation became effective, Vice-Chairman Robertson of the Board explained:

> The Board considers this to be a rather significant part of the Regulation, intended as a deterrent to those who might cease to charge a finance charge but, instead, inflate their so-called "cash" price and thus avoid compliance. 4 *C.C.H. Consumer Credit Guide*, ¶30,434.

Six months later, on December 9, 1969, Governor Robertson wrote:

> We believe that without this general provision [the four instalment rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged by Truth in Lending. In order to prevent this ironic result we felt it imperative to establish the more than four payment rule. 4 *C.C.H. Consumer Credit Guide* ¶30,228.

Again on March 3, 1970, Governor Robertson explained:

> The Board felt that it was imperative to include transactions involving more than four instalments under

> the Regulation since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth in Lending. Consequently we believe that this is a rather important part of the Regulation. . . . 4 *C.C.H. Consumer Credit Guide;* ¶30,320.

See also Hearings Before the Consumer Subcommittee of the House Banking and Currency Committee, 91st Cong., 1st Sess., Part II, p. 375 (1969).

The District Court in *Strompolos* also concluded that the four instalment rule was essential to avoid evasion:

> We agree with the Federal Reserve Board's evaluation of the necessity of this type of regulation.
>
> The facts of this particular case may very well demonstrate why the four installment rule is not only sensible but also necessary to prevent the Truth in Lending Act from being a hoax and a delusion upon the American public. Although the defendant contends that it charges the same unitary price for both credit and cash sales, it is readily apparent that a seller in any industry which sells primarily or almost exclusively on a long term credit basis could easily set a theoretical unitary cash and credit price which he knows no one will pay in less than four installments and thus exempt himself and his industry from the coverage of the Act. . . .
>
> It is most logical that the Federal Reserve Board would . . . plug a loophole by which a substantial portion of long term credit dealers could escape from the Act's coverage. Neither the law, the Federal Reserve Board nor the courts are so simplistic as to

> believe that a person in the business of extending long term credit should be permitted in effect to abolish the Truth in Lending Act by merely charging a single "cash or credit" price knowing full well that the great bulk of its customers will never pay in less than, for example, thirty months.
>
> . . . Were the Board not to have promulgated this rule nor the courts to sustain it, the Truth in Lending Act might never achieve its stated goals. 326 F. Supp. at 1103-04.

The Board's finding that the regulation is essential to prevent wholesale evasion of the Act is not subject to judicial review absent a clear showing of abuse of discretion on the part of the Board. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224 (1943). The Court of Appeals in the instant case, however, completely ignored both this principle of deference to the Board's expertise and the finding of the Board.

The Court of Appeals reasoned that if the literal definition of "creditor" in 15 U.S.C. §1602 (f) permitted on its face a scheme which would make a shambles of the entire statute, there was absolutely nothing the Board could do about it. This argument seriously misconstrues the purpose of the Act and the authority given to the Board. Congress did not intend to require exactly and only the disclosures set out in the statute under exactly and only those circumstances defined therein, authorizing the Board to merely resolve minor ambiguities. Rather the Congress intended, as it stated, "to assure meaningful disclosure of credit terms", and to this end set out a rough outline of what disclosures it believed would be needed under what circumstances to effectuate this purpose, and left it to the Board to fill in the details, correct any oversights or omissions, and make any necessary exceptions.

The express grant of rule making authority to the Board is extremely broad, and encompasses both interpretative and legislative rules:

> The Board shall prescribe regulations to carry out the purposes of this title. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this title, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. 15 U.S.C. §1604.

The grant of authority to avoid evasion is particularly applicable here. As the District Court reasoned in *Strompolos*:

> The wording of section 105 of the Act [15 U.S.C. §1604] clearly indicates, not only that Congress delegated to the Board authority to issue regulations to effectuate the purposes of the Act, but that Congress also went further and granted the Board the power to promulgate, at its discretion, regulations necessary to prevent *circumvention* of the Act. The use of the word "circumvention" in the Act signifies that Congress was aware that some creditors who would otherwise fall within the purview of the Act might, after passage of the Act, attempt to restructure their consumer business relations in such a manner that they might technically avoid the wording of the Act.
>
> Along with the recognition of this potential for evasion, Congress also recognized the equally obvious fact that no legislative body could conceivably put into a workable piece of legislation regulations and restrictions covering every imaginable business transaction wherein credit may be involved. Consistent with other

> complex regulatory legislation, Congress granted an administrative agency the power to apply the basic purposes of the Act to the everyday world. Not only did Congress order the Federal Reserve Board to promulgate regulations to effectuate the purposes of the Act, it also took the further affirmative step of enabling the Board to reach creditors, who in the Board's judgment, were attempting to circumvent or evade the Act by structuring their credit activities to fall a fine line outside the Act. 326 F. Supp. 1103-04.

Indeed, as the instant case makes clear, if the grant of authority to prevent evasion does not include the power to reach transactions just outside the literal reach of the statute that grant is meaningless.

That Congress should have given the Board the authority to modify the details of its statutory plan is not unusual. Congress could of course have given the Board the rule making authority set out in section 1604, and the broad statement of purpose in section 1601, and left it to the Board to promulgate the entire regulatory scheme. Compare *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (F.C.C. authorized to regulate broadcast industry in accordance with "public convenience, interest, or necessity"); *Federal Trade Commission* v. *Gratz*, 253 U.S. 421 (1920) (F.T.C. authorized to define and prevent "unfair methods of competition"). It was entirely proper for the Congress in the instant case to set out, in addition to a statement of the ultimate purpose to be sought by the Board, a sketch of how it thought that goal would be achieved subject to such "variations, extensions, or exemptions" as the Board might find necessary to effectuate the general purpose of the Act. *Davis on Administrative Law* §20; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932); *Sproles* v. *Binford*, 286 U.S. 374, 397

(1932); compare *Federal Power Commission* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). It is not, of course, necessary in each individual case for the Board to establish that the creditor is seeking to evade the law. Such a requirement would reduce the Board to proving the existence of a finance charge in each case and render nugatory its power to promulgate *rules* to avoid evasion. The Board need only have a reasonable basis for concluding that its regulation of the class of activities involved is necessary to effectuate the purposes of the Act. Compare *Perez* v. *United States*, 402 U.S. 146 (1971).

The four installment rule is also necessary to avoid hopeless confusion as to when a creditor in FPS's position has imposed a finance charge and is thus required to make disclosures. "Finance charge" is defined broadly in the statute to include "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. . . ." 15 U.S.C. §1606(a). As the District Court pointed out in *Strompolos*, 326 F. Supp. at 1103, the fact that a creditor purports to have a cash price equal to his credit price may only mean that the finance charge is well hidden.

As a practical matter any creditor who permits a customer to defer payment of an obligation for goods or services already provided or paid for by the creditor must as a consequence borrow from a third party or his own capital reserves and incur a finance charge or resulting loss of interest. He must also maintain, as FPS evidently did, some form of collection department. The costs of the creditor's borrowing and collections, as well as his bad debt reserve, must ultimately and literally come out of his customer's pockets, since, as in the case of FPS, their

payments to him are his only source of funds, regardless of whether the creditor in any sense "intends" to bury a finance charge in his prices. FPS presumably met all these costs out of the difference between the amount received from its customers and the amount it paid to the magazine publishers. The statute sets no standards, however, for determining the existence and amount of a finance charge under these circumstances, and the Court of Appeals in the instant case intimated no suggestions as to what sort of proof petitioner could have offered along these lines.

Section 226.2(k) resolves this problem as a practical matter by requiring disclosures in all transactions involving more than four installments. The section may be understood as an interpretation of the definition of "finance charge" in Section 1606(a). As such it would reflect the Board's apparent conclusion that it would not be feasible to determine for categories of transactions or on a case by case basis when the price paid by the consumer includes, purposely or otherwise, part of all of the costs necessarily incurred by the creditor in extending credit. See 4 *C.C.H. Consumer Credit Guide* ¶30,228.

In the instant case both the Federal Reserve Board and the Federal Trade Commission, which share the primary responsibility for interpreting and enforcing the Act, believe that the four installment rule set out in §226.2(k) and promulgated within a year of the passage of the Act is a valid use of the Board's general rule making authority. See 4 *C.C.H. Consumer Credit Guide* ¶¶30,114, 30,658. A strong presumption of validity attaches to "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prod. Co.* v.

United States, 288 U.S. 294, 315 (1933). The presumption is particularly weighty when the regulation involved is directed at effectuating the ultimate purposes of the Act. *General Telephone Co. of California* v. *Federal Communications Commission*, 413 F.2d 390, 403 (D.C.Cir. 1969).

The decision of the Court of Appeals in the instant case is not only clearly erroneous, but has opened the door to wholesale evasion of the Consumer Credit Protection Act. If the four installment rule is invalidated there will be little if any incentive to prevent merchants from reverting with avengeance to the practices common prior to the passage of the Act, disclosing neither finance charges, interest rates, or total prices for their goods. The success of such a scheme of evasion will give merchants selling on credit a substantial and unwarranted competitive edge over banks and other lenders who have no price in which to bury their finance charges. Such results would have a particularly adverse effect on the poor. Burying finance charges and advertising "free credit" was especially common prior to 1969 in ghetto neighborhoods, and low income consumers are particularly susceptible to these practices because they are least likely to ask the total cost of some good or service so long as the monthly payments seems within their reach. See Comment, "Consumer Legislation and the Poor," 76 *Yale L.J.* 745, 762-63 (1967). Moreover, the Court of Appeals' constricted view of the Board's rule making authority calls into question the validity of, and is likely to precipitate a flury of attacks on the many other regulations with which creditors may prefer not to comply.

The need for a final ruling by this Court on the validity of the four installment rule is particularly great because of the financial stakes involved. The regulation invalidated by the Fifth Circuit is still being enforced in the Northern District of Illinois because of *Strompolos*. Throughout the

rest of the country there is general uncertainty as to whether compliance is necessary in view of the conflict between the instant case and *Strompolos*. A creditor who gambles that the regulation will be invalidated in his Circuit and loses may be liable for millions of dollars in statutory damages. A creditor who presumes incorrectly that the regulation will be held valid in his area stands to lose a substantial amount of business because of the competitive edge assumed by his non-complying competitors. The nine federal agencies charged with enforcing the Act as to various groups of creditors are themselves left in a quandary as to how to proceed pending a final resolution of this question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No: 70-559-Civ-WM

Filed November 27, 1970

LEILA MOURNING, on behalf of herself and all those similarly situated,

Plaintiffs,

vs.

FAMILY PUBLICATIONS SERVICE, INC.,

Defendant.

AMENDED ORDER GRANTING FINAL SUMMARY JUDGMENT TO PLAINTIFF, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CLASS ACTION CLAIM

THIS CAUSE came on to be heard upon the Defendant's motion to amend this Court's Order and judgment entered October 30, 1970, and the Court having heard argument of counsel, and having considered the memoranda sub-

mitted by counsel for the parties, and being otherwise fully advised in the premises,

The Court finds that the Plaintiff, LEILA MOURNING, cannot fairly and adequately protect the interests of the alleged class in this cause, and any previous order herein to the contrary is superceded by this Order and Judgment, and it is therefore,

ORDERED AND ADJUDGED that this action shall not be maintained as a class action, and the class action claim of the "second amended complaint" is hereby dismissed, and it is further,

ORDERED AND ADJUDGED that this Court's Order of October 30, 1970, be and it is hereby vacated and amended to state as follows:

THIS CAUSE having come on before me upon Motions for Summary Judgment filed by the parties, Philip L. Coller, Esq. of the Legal Services Senior Citizens Center, and M. Donald Drescher, Esq., appearing for the Plaintiff, and Peter Fay, Esq. of Frates Fay Floyd & Pearson, P.A., appearing for the Defendant, and the Court having heard argument of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This action is founded on the Consumer Credit Protection Act (Title I, Truth in Lending Act) 15 USC §1601 et seq., and the Regulations duly promulgated thereunder by the Board of Governors of the Federal Reserve System

(Regulation Z, 12 CFR §§226.1-226.12). The relief sought is recovery of a civil penalty imposed by the Act for failure to make disclosures required by the Act and its Regulations.

There is no issue as to any material fact. Defendant admits (1) that it entered into a written standard form contract with the named Plaintiff and other members of this class; and (2) that the standard form contract did not contain the disclosures specified by the Truth in Lending Act. Further, Defendant admits contacting the named Plaintiff on several occasions subsequent to the filing of this suit to enforce collection of a debt asserted by Defendant against the Plaintiff. Defendant is engaged in the interstate business of soliciting subscriptions to magazines and offering contracts therefor. The contract on its face provides that the customer agrees to pay a stated sum over a period of 24 or 30 months, that it is non-cancellable and that "Payments due monthly, otherwise entire balance due."

Plaintiff Leila Mourning entered into a standard form contract with the Defendant on August 19, 1969. Subsequent to July 1, 1969, the date the Act went into effect, a number of other individuals in Dade County entered into identical or similar contracts with the Defendant.

The sole question presented is: "Does the transaction here sued upon come within the scope of the Truth in Lending Act and the Regulations duly promulgated thereunder?"

Conclusions of Law

A. The Truth in Lending Act and the Regulations must be interpreted so as to be consistent with each other and

with the declared Congressional purpose of the Act—"to assure meaningful disclosure of credit terms."

B. The uncontroverted evidence before the Court plainly demonstrates that it is the intent of the Regulation and the interpretation of the Federal Reserve Board and of the staff of the Federal Trade Commission that the transaction here in question falls squarely within the scope of the Act and its Regulations by virtue of the "more than four installments" rule, 12 CFR §226.2(k); F.R.B. Letter, July 24, 1969, 1 CCH, Consumer Credit Guide, §§30,113, 30, 114; FTC Letter, September 3, 1970 (in Court file); CLE, TRUTH IN LENDING IN FLORIDA, Chapter 2.2(D); Tanner, Truth in Lending and Regulation Z — A Primer, 6 Ga. S.B.J. 1 (Aug. 1969).

C. The uncontroverted facts show that Consumer credit was extended by the Defendant to the Plaintiff. The Plaintiff received a present contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments. The promise to pay is unconditional and non-cancellable, and, further, the written agreement provides that "Payments due monthly, otherwise entire balance due." The evidence before the Court regarding the named Plaintiff reveals that the Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff.

D. No constitutional question is presented by the case at bar.

E. The answer to the question presented to the Court must be "yes," and since the Defendant has extended "Consumer credit" within the meaning of the Truth in Lending Act and its Regulations and has failed to make

Amended Order Granting Final Summary Judgment

the material disclosures required by 15 USC §1631 and 12 CFR §226.8, the Defendant is liable to the Plaintiff for the penalties imposed by 15 USC §1640(a).

Accordingly, it is ORDERED AND ADJUDICATED:

1. That the motion of Plaintiff, LEILA MOURNING, for summary judgment be and the same is granted and the Defendant's motion for summary judgment is denied.

2. That as a penalty for its failure to provide the disclosures required by the Act and its Regulations, the Defendant shall pay to the Plaintiff, LEILA MOURNING, the sum of One Hundred Dollars ($100.00).

3. That the Clerk of this Court shall enter final judgment in favor of Plaintiff, LEILA MOURNING, against the Defendant, FAMILY PUBLICATIONS SERVICE, INC., in the amount of One Hundred Dollars ($100.00), plus 1500.00 on behalf of Plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the costs of this action.

DONE AND ORDERED in Chambers at Miami, Florida, on this 27th day of November, 1970.

/s/ W. MEHRTENS
United States District Judge

Opinion of United States Court of Appeals For the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1150

LEILA MOURNING, ET AL.,

Plaintiffs-Appellees,

versus

FAMILY PUBLICATIONS SERVICE, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 27, 1971)

Before

COLEMAN, SIMPSON, and RONEY,

Circuit Judges.

COLEMAN, Circuit Judge: The validity of Regulation Z,[1] promulgated by the Federal Reserve Board under the Truth-In-Lending Act,[2] is the material issue in this appeal. The District Court held for validity. We reverse.

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[1] 12 C.F.R. 226.

[2] 15 U.S.C., §1601, et seq.

Opinion of United States Court of Appeals For the Fifth Circuit

I

The Facts

Appellant, Family Publications Service, Inc., is a Delaware Corporation engaged in the interstate business of soliciting subscriptions and offering contracts for the sale and delivery of a large number of well known periodicals.

The appellee Leila Mourning, is a seventy-three year old widow having her domicile in Dade County, Florida.

Under appellant's method of conducting its business for the sale and delivery of well known periodicals, the customer under a standard form contract agrees to receive his particular magazine selections for 48 (or 60) months and to pay for them over the first 24 (or 30) months. Under normal operating circumstances, the appellant expects to receive a prepayment for magazines to be delivered to the customer in the future. The only circumstances in which magazines are occasionally delivered prior to appellant's receipt of payment for them is when a customer defaults in making the prepayment. According to the appellant, these transactions, contractual in nature, for the sale and delivery of magazines do not involve the extension of credit as defined by the Truth-In-Lending Act or the imposition of a finance charge, either directly or indirectly, requiring the disclosures specified in the Truth-In-Lending Act.

On August 19, 1969, appellee entered into a written contract with the appellant for the purchase of the *Ladies Home Journal*, *Holiday*, *Life*, and *Travel and Camera*. As usual, the standard form contract required the appellee to make thirty monthly payments of $3.95 each, in return for which she would receive magazines for sixty months. The contract provided that it was non-cancellable and that failure to

make the monthly payments would result in the entire balance becoming due. Said contract is the only instrument executed and existing between the parties and it does not contain a disclosure as to the total purchase price, finance charges, service charges, or the amount to be financed.

Although Leila Mourning, the appellee, received the magazines ordered, she defaulted on her contract and never made any payments beyond the initial $3.95. Consequently, her contract was cancelled by Family Publications Service, Inc., on April 15, 1970. Appellant admits contacting the named appellee on several occasions seeking to enforce the contract. In those letters, appellant explained that it had already entered her subscriptions for the entire period; that it was a financier which had fully invested in her contract and would not receive a refund from the publishers; that Mrs. Mourning would have had to pay in advance had she dealt directly with the publishers; that she had an obligation to repay appellant on her "credit" account, much the same as if she had purchased any other type of merchandise; and that the entire balance of $118.50 was due.

On April 23, 1970, Mrs. Mourning filed her civil suit asserting that the appellant, Family Publications Service, Inc., had failed to make the disclosures required by the Truth-In-Lending Act and, on that basis seeking the civil penalty, including the attorney's fees, prescribed by the Act.

II

The Decision of the District Court

Both Mrs. Mourning and Family Publications, Inc. moved for summary judgment. The judgment went to the plaintiff, in the following language:

Opinion of United States Court of Appeals For the Fifth Circuit

"THIS CAUSE having come on before me upon Motions for Summary Judgment filed by the parties, Philip L. Coller, Esq. of the Legal Services Senior Citizens Center, and M. Donald Drescher, Esq., appearing for the Plaintiff, and Peter Fay, Esq. of Frates Fay Floyd & Pearson, P.A., appearing for the Defendant, and the Court having heard argument of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

"This action is founded on the Consumer Credit Protection Act (Title I, Truth in Lending Act) 15 USC §1601 et seq., and the Regulations duly promulgated thereunder by the Board of Governors of the Federal Reserve System (Regulation Z, 12 CFR §§226.1-226.12). The relief sought is recovery of a civil penalty imposed by the Act for failure to make disclosures required by the Act and its Regulations.

"There is no issue as to any material fact. Defendant admits (1) that it entered into a written standard form contract with the named Plaintiff and other members of this class; and (2) that the standard form contract did not contain the disclosures specified by the Truth in Lending Act. Further, Defendant admits contacting the named Plaintiff on several occasions subsequent to the filing of this suit to enforce collection of a debt asserted by Defendant against the Plaintiff. Defendant is engaged in the interstate business of soliciting subscriptions to magazines and offering contracts therefor. The contract on its face provides that the customer agrees to pay a stated sum over a period

of 24 or 30 months, that it is non-cancellable and that 'Payments due monthly, otherwise entire balance due'.

"Plaintiff Leila Mourning entered into a standard form contract with the Defendant on August 19, 1969. Subsequent to July 1, 1969, the date the Act went into effect, a number of other individuals in Dade County entered into identical or similar contracts with the Defendant.

"The sole question presented is: 'Does the transaction here sued upon come within the scope of the Truth in Lending Act and the Regulations duly promulgated thereunder?'

CONCLUSIONS OF LAW

"A. The Truth in Lending Act and the Regulations must be interpreted so as to be consistent with each other and with the declared Congressional purpose of the Act—'to assure meaningful disclosure of credit terms.'

"B. The uncontroverted evidence before the Court plainly demonstrates that it is the intent of the Regulation and the interpretation of the Federal Reserve Board and of the staff of the Federal Trade Commission that the transaction here in question falls squarely within the scope of the Act and its Regulations by virtue of the 'more than four installments' rule, 12 CFR §226.2 (k); F.R.B. Letter, July 24, 1969, 1 CCH, *Consumer Credit Guide,* §§30,113, 30,114; FTC Letter, September 3, 1970 (in Court file); *CLE, TRUTH IN LENDING IN FLORIDA,* Chapter 2.2 (D) *Tanner, Truth in Lending and Regulation Z - - - A Primer,* 6 Ga. S.B.J. 1 (Aug. 1969).

"C. The uncontroverted facts show that Consumer credit was extended by the Defendant to the Plaintiff. The Plaintiff received a present contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments. The promise to pay is unconditional and non-cancellable, and, further, the written agreement provides that 'Payments due monthly, otherwise entire balance due'. The evidence before the Court regarding the named Plaintiff reveals that the Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff.

"D. No constitutional question is presented by the case at bar.

"E. The answer to the question presented to the Court must be 'yes,' and since the Defendant has extended 'Consumer credit' within the meaning of the Truth in Lending Act and its Regulations and has failed to make the material disclosures required by 15 USC §1631 and 12 CFR §226.8, the Defendant is liable to the Plaintiff for the penalties imposed by 15 USC §1640(a).

"Accordingly, it is Ordered and Adjudicated:

"1. That the motion of Plaintiff, Leila Mourning, for summary judgment be and the same is granted and the Defendant's motion for summary judgment is denied.

"2. That as a penalty for its failure to provide the disclosures required by the Act and its Regulations,

the Defendant shall pay to the Plaintiff, LEILA MOURNING, the sum of One Hundred Dollars ($100.00).

"3. That the Clerk of this Court shall enter final judgment in favor of Plaintiff, LEILA MOURNING, against the Defendant, FAMILY PUBLICATION SERVICE, INC., in the amount of One Hundred Dollars ($100.00), plus 1500.00 on behalf of Plaintiff, LEILA MOURNING, as a reasonable attorneys' fee and the costs of this action."

We have included the Findings and Conclusions because they reveal the absence of any finding that a finance charge was involved in this transaction. The defendant's answer denied the existence of such a charge, and the plaintiff did not traverse it. The long and the short of it is that the plaintiff and the court stood on the Regulation.

III

The Truth-In-Lending Act, Its Statutory Scheme, and Regulation Z

Recognizing that the full disclosure of finance charges would greatly aid consumers in deciding for themselves the reasonableness of the credit charges imposed and would thereby enable consumers to effectively shop for credit, the Truth-In-Lending Act, Title I of the Consumer Credit Protection Act, Public Law 90-321, 82 Stat. 146, was enacted by the Congress, establishing the statutory requirement that as a matter of fair play to the consumers

the cost of credit should be disclosed fully, simply, and clearly. United States Code Congressional and Administrative News, 90th Congress, Second Session (1968), pp. 1962, 1965. It was the feeling of the Congress that "the informed use of credit results from an awareness of the cost thereof by consumers". 15 U.S.C., §1601.

The basic thrust of the Truth-In-Lending Act is that each creditor who regularly extends, or arranges for his debtors in consumer transactions to defer payment of debt or to incur debt and defer its payment and who *thereby as an incident to such extension or arrangement for the deferred payment of debt imposes either directly or indirectly a finance charge for such deferred debt,* shall disclose clearly and conspicuously, in accordance with the regulations of the Board of Governors of the Federal Reserve System, to each person to whom such right of deferred payment of debt is granted and upon which right a finance charge is or may be imposed, the information required by 15 U.S.C., §1638(a), 15 U.S.C., §1602(e) and (f), §1605(a), §1631(a). According to such section, 15 U.S.C., §1638(a), in any consumer transaction, not under an open end credit plan, where the debtor is granted the right to defer payment of debt or to incur debt and defer its payment, *and for which right the payment of a finance charge is required of the debtor by the creditor,* the creditor shall disclose each of the following items:

1. The cash price of the item purchase, 15 U.S.C., §1638(a)(1).
2. The amount of the down payment, 15 U.S.C., §1638(a)(2).

3. The difference between the cash price of the item purchased and the amount of the down payment, 15 U.S.C., §1638(a)(3).

4. All additional charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge, 15 U.S.C., §1638(a)(4).

5. The total amount to be financed (the sum of #3 and #4), 15 U.S.C., §1638(a)(5).

6. Amount of the finance charge, 15 U.S.C., §1638(a)(6).

7. The annual percentage rate of the finance charge, 15 U.S.C., §1638(a)(7).

8. The schedule of payments required, 15 U.S.C., §1638(a)(8).

9. The charges for late payments, 15 U.S.C., §1638(a)(9).

10. A description of any security interest involved, 15 U.S.C., §1638(a)(10).

In order to assure the effective operation of the statutory provisions of the Act and to assure the meaningful disclosures of credit terms so that all consumers would be able to compare more readily the various credit terms available and thereby avoid the uninformed use of credit, the Act delegated to the Board of Governors of the Federal Reserve System the authority to promulgate regulations to accomplish the above-mentioned objectives, 15 U.S.C., §1604. This section expressly authorized the Board of Governors to promulgate regulations containing such classifications, differentiations, or other provisions, and providing for such

adjustments and exceptions for any class of transactions, as in the judgment of the Board of Governors are necessary or proper to effectively effectuate the purposes of the Truth-In-Lending Act, to prevent the circumvention or evasion of such statutory provisions, or to facilitate compliance with such provisions. In connection with the Truth-In-Lending Act's delegation of authority to promulgate regulations, the Act provided that any reference in the Act to requirements imposed by the Act included reference to the Board of Governor's regulations, 15 U.S.C., §1602(k).

In addition to the specification in the Truth-In-Lending Act of criminal penalties for the wilful and knowing failure of a creditor to make the required disclosures of 15 U.S.C., §1638(a), or for failing to comply with any other requirements of the Act, 15 U.S.C., §1611, the Act established two methods of civil enforcement. One is administrative in nature and is vested (1) in a number of federal agencies which already exercised jurisdiction by virtue of other statutory authority, over particular classes of creditors, 15 U.S.C., §1607(a), and (2) in the Federal Trade Commission with respect to all other creditors, 15 U.S.C., §1607(c).

The other civil remedy established by Congress was made available directly to consumers. Specifically, the Act established federal court jurisdiction over actions for a civil penalty and authorized the courts, in successful actions, to award the consumer a reasonable attorneys' fee, 15 U.S.C., §1640(a) and (e). The amount of the civil penalty was set at "an amount equal to the sum of *twice the amount of the finance charge in connection with the transaction*", except that the penalty could not be less than $100 nor greater than $1,000, 15 U.S.C., §1640(a).

The Four Installment Rule of Regulation Z

On February 10, 1969, the Board of Governors of the Federal Reserve System implemented the Act by promulgating a set of regulations dealing comprehensively and thoroughly with all aspects of the Truth-In-Lending Act.

Within these regulations there was included a provision that the Board of Governors of the Federal Reserve System determined that the Act's disclosure requirements would be applied not only to those creditors who extend consumer credit which involves an expressly stated finance charge, *but also those who extend consumer credit for which no finance charge is stated but which pursuant to agreement, is or may be payable in more than four installments.*

The purpose, indeed the inescapable result of the Regulation, is the imposition of a conclusive presumption that those who extend credit and permit payment in four or more installments have added a finance charge for the extension of credit.

The primary question, then, is: Was such a requirement within the delegated authority of the Board?

IV

Our Decision

As already stated, the Act requires that "each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under 15 U.S.C., §1638(a)." 15 U.S.C., §1631(a). For failure in connection with any consumer credit transaction to disclose

to any person information required by 15 U.S.C., §1638(a), the Truth-In-Lending Act imposes on such creditor civil liability, 15 U.S.C., §1640, and in cases of wilful and knowing violation of the disclosure requirement, criminal liability, 15 U.S.C., §1611. This particular action was brought under the civil liability provisions.

Mindful of the Supreme Court's decision in *Federal Communication Commission* v. *American Broadcasting Company,* 347 U.S. 284, 290 (1954), that penal statutes are to be strictly construed, and mindful that it is the duty of the judiciary to finally determine the proper construction of statutes, this Court construes 15 U.S.C., §1631 to require that three essential elements must be found present together in a transaction before a person is obligated under the Truth-In-Lending Act to make the information disclosures listed in 15 U.S.C., §1638(a). These three essential elements consist of the following:

First, there must be found present a *creditor* as defined by the Act, or a person who regularly extends or arranges for the extension of the right to defer payment of debt, or to incur debt and defer its payment, and for which right of deferred payment the payment of a finance charge is required, 15 U.S.C., §1602(e) and (f).

Secondly, there must be found present a *consumer credit* transaction as defined by the Act, or a transaction in which the person to whom is extended the right to defer payment of debt or to incur debt and defer its payment is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes, 15 U.S.C., §1602(e) and (h).

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Thirdly, there must be found present a *"finance charge"* as defined by the Act, 15 U.S.C., §1605(a), and §1602(e) and (f).

Regulation Z provides:

> "Consumer credit means credit offered or extended to a natural person, in which the money, property, or service which is subject of the transaction is primarily for personal, family, household, or agricultural purposes for which either a finance charge is or may be imposed or which, pursuant to an agreement, is or may be payable in more than four installments."

According to the brief of the United States as amicus curiae, the four installment rule in effect establishes a conclusive presumption that those who extend credit and allow payment in four or more payments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they purport not to levy a finance charge. Therefore, we can conclude from the Regulation promulgated by the Board of Governors of the Federal Reserve System, from the decision of the lower district court, and from the brief filed in this cause by the United States as amicus curiae, that in order for the disclosure and penalty provisions of the Truth-In-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required. The presence of a finance charge

is conclusively presumed from the nature of the transaction, involving payment in more than four installments.

It can be readily seen from a consideration of the four installment rule of Regulation Z as defined by the appellee and from a consideration of this Court's construction of the statutory provisions of the Truth-In-Lending Act that an inconsistency exists between the four installment rule and the Truth-In-Lending Act. On the one hand, the four installment rule requires the application of the disclosure and penalty provisions of the Truth-In-Lending Act to transactions involving the extension of credit which, pursuant to agreement, is or may be payable in more than four installments, *whether or not a finance charge is proven to have been imposed,* directly or indirectly, as an incident to the extension of credit. On the other hand, the statutory provisions of the Truth-In-Lending Act requires that a finance charge must be found present, directly or indirectly, along with the other two essential elements in a transaction before such transaction is considered to be subject to the penalty and disclosure provisions of the Truth-In-Lending Act.

By extending the applicability of the disclosure and penalty provisions of the Truth-In-Lending Act to transactions involving the extension or credit repayable by agreement in more than four installments, whether or not there is found in such transactions the imposition of a finance charge as an incident to the extension of credit, the Board of Governors, in our opinion, over-stepped the authority granted to them under 15 U.S.C., §1604. The authority delegated to the Board of Governors to prescribe such regulations as they deem necessary and proper to further the purposes of the Act and to prevent the cir-

cumvention of the Act did not include the authority to make subject to the disclosure and penalty provisions of the Act transactions not involving the imposition of a finance charge, and therefore not covered within the scope of the Act.

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of the Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity", *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528 (1935).

We therefore hold that the four installment rule of Regulation Z constituted an administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment. The effect of such an effort comes within the condemnation of decisions of the Supreme Court. This condemnation is exemplified by *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87, 80 S.Ct. 144, 4 L.Ed.2d 127 (1959), where the Court stated:

> "But the section contains nothing to that effect, and therefore, to uphold this addition to the tax would be to hold that it may be imposed by regulation, which, of course, the law does not permit. *United States* v. *Calamaro*, 354 U.S. 351, 359; *Koshland* v. *Helvering*,

298 U.S. 441, 446, 447; *Manhattan Co.* v. *Commissioner*, 297 U.S. 129, 134."

Equally applicable to the above holdings of the United States is this Court's opinion in *United States* v. *Marett*, 5 Cir., 1963, 325 F.2d 28, 30, 31.

As previously noted, the four installment rule of Regulation Z which decrees that those who extend credit and permit payment in more than four installments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they purport not to levy a finance charge, creates a conclusive or irrebuttable presumption. Such a presumption states a rule of substantive law. This is in contrast to a rebuttable presumption which only states a rule of evidence and which the opposing party is entitled to overcome by proof. The Supreme Court has held that a statute which creates a conclusive presumption contravenes the Fourteenth Amendment, if enacted by the State Legislature. It violates the Fifth Amendment if enacted by the Congress.

In *Schlesinger* v. *State of Wisconsin*, 270 U.S. 230, 46 S.Ct. 260, 70 L.Ed. 557 (1926), the Supreme Court struck down as violative of the Fourteenth Amendment a statute of the State of Wisconsin which provided in effect that gifts of a decedent estate made within six years of death were made in contemplation thereof. The Court, 270 U.S., at page 239, 46 S.Ct., at page 261, stated:

> "The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within 6 years of death were made in anticipation of it and to lay a graduated tax upon them without regard to the actual intent. The presumption is declared to

> be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."

In *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), the Court likewise struck down a Congressional enactment which created a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death, on the ground that the provision violated the Fifth Amendment of the Constitution. The Court pointed out, 285 U.S., at page 324, 52 S.Ct., at page 360, that Congress had the power to create a rebuttable presumption, and stated:

> "But the presumption here created is next of the kind. It is made definitely conclusive, incapable of being overcome by proof of the most positive character."

And further the Court stated, 285 U.S., at page 329, 52 S.Ct., at page 362:

> "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment."

It thus appears that Congress itself would have been without power to create the conclusive presumption which the Board of Governors seeks to accomplish in the four installment rule. It is then even more certain that an administrative agency is without authority to promulgate such a regulation. Therefore, we conclude that the four installment rule, as promulgated by an agency of the Federal Government is void because it violates the Fifth

Amendment to the Constitution. Although Regulation Z was designed by the Board of Governors to prevent circumvention of the Act and to facilitate the purposes of the Act, in its present language it exceeded the authority delegated, or which could have been delegated, to the Board and is, as presently written, void. This necessitates the reversal of the judgment below.

We further point out that since this transaction carried with it no finance charge, or cost of credit, it was without the scope of the Act, leaving aside the matter of Regulation Z, 15 U.S.C., §1602(e) and (f).

The judgment of the District Court is reversed and remanded with directions that the complaint be dismissed.

REVERSED and REMANDED With Directions.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 71-1150

D. C. Docket No. Civ. 70-559-WM

LEILA MOURNING, *et al.*,

Plaintiffs-Appellees,

versus

FAMILY PUBLICATIONS SERVICE, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before COLEMAN, SIMPSON and RONEY, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby

remanded to the said District Court with directions that the complaint be dismissed.

September 27, 1971

Issued As Mandate: Oct. 19, 1971.

[SEAL]

A true copy 12-7-71
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By /s/BARRY W. STIRLING
Deputy

New Orleans, Louisiana

Judgment of Court of Appeals

remanded to the said District Court with directions that the complaint be dismissed.

September 27, 1971

Issued as Mandate: Oct. 19, 1971.

[Seal]

A true copy

Test: Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit

By [illegible]

Deputy

New Orleans, Louisiana

United States Court of Appeals

For the Fifth Circuit

October Term 1970

Family Representatives Service, Inc.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Coleman, Simpson and Roney, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; and that this cause be, and the same is hereby

In the

Supreme Court of the United States

October Term 1971

No. 71-829

LEILA MOURNING, *Petitioner*

v.

FAMILY PUBLICATIONS SERVICE, INC., *Respondent*

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM 1971

No. 71-829

LEILA MOURNING, *Petitioner*

v.

FAMILY PUBLICATIONS SERVICE, INC., *Respondent*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The National Conference of Commissioners on Uniform State Laws hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of James Nabrit, Esquire, attorney of record for Petitioner, has been obtained. The consent of Robert S. Rifkind, Esquire, attorney for Respondent, was requested but refused.

The interest of the National Conference in this case arises from the fact that the Uniform Consumer Credit Code (UCCC), which the Conference drafted to be in harmony with the Truth in Lending Act (15 U.S.C. §§ 1601 et. seq.), applies to all consumer credit transactions in which,

inter alia, either a finance charge is imposed or the debt is paid in multiple instalments (UCCC §§ 2.104 and 3.104). Moreover, UCCC §§ 2.301 and 3.301 provide that compliance with Truth in Lending is the equivalent of compliance with the UCCC. The Board of Governors of the Federal Reserve System is directed to exempt from the applicability of Truth in Lending those states having laws substantially similar, and the Board has considered the UCCC disclosure provisions to be sufficiently similar to those of Truth in Lending to merit exemption. (15 U.S.C. § 1633) If the Fifth Circuit's rejection of the validity of the more-than-four-instalments rule of Regulation Z (12 C.F.R. § 226.2(k)) is allowed to stand, grave uncertainties arise concerning: (1) the status of the disclosure provisions of the UCCC as being sufficiently similar to those of Truth in Lending to qualify for exemption; and (2) whether in UCCC states creditors not separately stating a finance charge in multiple instalment cases need any longer comply with the disclosure provisions of the UCCC owing to UCCC §§ 2.301 and 3.301. The National Conference believes that clarification of the status of the more-than-four-instalment rule is necessary at the highest judicial level in order that the Conference can continue its cooperation with the Board in providing American consumers with a uniform law of credit disclosure.

Respectfully submitted,

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[illegible] National Conference of Commissioners on Uniform State Laws [illegible]

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In the
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LEILA MOURNING, *Petitioner*

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. STATEMENT OF THE CASE

This brief is submitted by the National Conference of Commissioners on Uniform State Laws as *amicus curiae* in support of the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The interest of *Amicus* in this case is fully set forth in its attached Motion for leave to file this brief. The discussion which follows is confined to the issue of the validity of the more-than-four-payments rule of Regulation Z (12

C.F.R. § 226.2(k)) as a proper exercise of the authority of the Board of Governors of the Federal Reserve System to prescribe regulations to carry out the purposes of the Truth in Lending Act (15 U.S.C. § 1604).

The suit arose from a contract entered into between petitioner and respondent under which petitioner was to receive four magazines for 60 months in exchange for an initial payment of $3.95 and 30 monthly payments of $3.95. Respondent made none of the disclosures specified in the Truth in Lending Act (15 U.S.C. §§ 1601 et seq.) and Regulation Z (12 C.F.R. § 226). The District Court held that since the contract was payable in more than four installments, it was a consumer credit transaction subject to the Act and that disclosures should have been made. The Fifth Circuit reversed and remanded with directions that the complaint be dismissed on the ground that the more-than-four-payments rule of 12 C.F.R. § 226.2(k) was unconstitutional as in excess of the authority granted the Board of Governors of the Federal Reserve System to prescribe regulations implementing the Truth in Lending Act (15 U.S.C. § 1604). *Mourning v. Family Publications Service, Inc.*, 449 F.2d 235, CCH Consumer Credit Guide ¶ 99,337 (5th Cir. 1971), *rev'g* CCH Consumer Credit Guide ¶ 99,632 (S.D. Fla. 1970).

II. ARGUMENT

A. The Decision Below Raises an Important Issue of First Impression Affecting Innumerable Credit Transactions.

The Fifth Circuit's opinion in this case withdraws the substantial protections of the Truth in Lending Act (hereafter referred to as the Act) (15 U.S.C. § 1601 et seq.), from consumers in all transactions in which creditors do

not choose to state separately a finance charge. It is a fair assumption that in the bulk of consumer credit transactions today a finance charge is separately stated but that in a substantial segment of the consumer credit market the cost of credit is included in the sale price (credit jewelers, clothiers, land sales, leases, and the like) and is not separarately disclosed.[1] The Congressional mandate to the Board of Governors of the Federal Reserve System is to "prescribe regulations to carry out the purposes of" the Act (15 U.S.C. § 1604) and the purpose of the Act is declared to be that of assuring consumers "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various *credit terms* available to him and to avoid the uninformed use of credit." (Emphasis added).

In implementation of this charge, the Board prescribed regulations requiring a statement of the terms of credit not only by those creditors who choose to state a separate finance charge but also by creditors who make no separate statement of a finance charge but who engage in credit transactions involving a substantial period of credit extension, i.e., where by agreement the contract is payable in more than four installments. (12 C.F.R. § 226.2(k)). By adoption of the more-than-four-installments rule the Board

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[1] *See* Johnson, *The Uniform Consumer Credit Code and the Credit Problems of the Low Income Consumers*, 37 Geo. Wash. L. Rev. 1117, 1119 (1969); Jones, *The Inner City Marketplace: The Need For Law and Order*, 37 Geo. Wash. L. Rev. 1015 (1969); Jordan and Warren, *Disclosure of Finance Charges: A Rationale*, 64 Mich. L. Rev. 1285, 1301 (1966); Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. Rev. 1, 6-7 (1969); Lynch, *Consumer Credit at Ten Percent Simple: The Arkansas Case*, U. of Ill. L.F. 592, 606 (1968); Spanogle, *How Much Truth in What Kinds of Lending*, 16 J. Pub. L. 296, 303 n.27 (1967); White, *Consumer Credit in the Ghetto: UCCC Free Entry Provisions and the Federal Trade Commission Study*, 25 Bus. Law. 147 (1969); Comment, *Consumer Protection in Michigan: Current Methods and Some Proposals for Reform*, 68 Mich. L. Rev. 926, 936 (1970); Comment, *Consumer Legislation and the Poor*, 76 Yale L.J. 745, 762 (1967).

extended full disclosure to virtually all consumer credit transactions in which significant extensions of credit are present, thereby affording the American consumer a meaningful basis not only for comparing transactions in which a finance charge is stated separately but also for comparing those transactions with other credit transactions in which no finance charge is stated. In each instance the Board has given the consumer the advantage of knowing the number, amounts and due dates of payments, as well as the total amount of payments owed. (12 C.F.R. § 226.8 (b)). Hence, the consumer can make an effective comparison between the cost of employing credit in cases in which a finance charge is separately stated and those in which it is not. Moreover, important information about credit insurance, balloon payments, the amounts of additional fees and charges, and the existence of security interests (12 C.F.R. § 226.8(b) and (c)), as well as two of the Act's major substantive protections, those relating to advertising (15 U.S.C. § 1661 et seq.) and rescission (15 U.S.C. § 1635), are assured for all consumers entering into credit transactions of significant duration rather than only for those consumers fortunate enough to deal with creditors making separate disclosure of finance charges.

It would be incredible if the first major piece of consumer credit legislation enacted by Congress could be avoided merely by a creditor's choice of including his credit costs within the price of his product rather than stating them separately.

"Neither the law, the Federal Reserve Board nor the courts are so simplistic as to believe that a person in the business of extending long term credit should be permitted in effect to abolish the Truth in Lending Act by merely charging a single 'cash or credit' price knowing full well that the great bulk of its customers

will never pay in less than, for example, thirty months." *Strompolos v. Premium Readers Service*, 362 F. Supp. 1100, 1108 (N.D. Ill., 1971)

For creditors doing a substantial portion of their business on a cash basis, burying the finance charge would presumably be discouraged by market pressures, but for the many creditors who do most or all of their business on credit the consequences of the decision whether to state or bury credit costs in the price become substantial. If the choice of burying credit costs in the price of the product gives them clear exemption from Truth in Lending, this choice will be increasingly easy to make. Governor J. L. Robertson showed the Board's concern about this danger when he said:

> "We believe that without this general provision [the more-than-four-installments rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged to a great extent by Truth-in-Lending. In order to prevent this ironic result we felt it imperative to establish the more than four payments rule." CCH Consumer Credit Guide ¶ 30,228.

In 15 U.S.C. § 1604 Congress enjoined the Board "to effectuate the purposes of this [Act], to prevent circumvention thereof, or to facilitate compliance therewith" by such regulations as are "necessary or proper" to accomplish these results "in the judgment of the Board." The Board has exercised its judgment responsibly to effectuate the purposes of this Act and to prevent evasion thereof by adopting the more-than-four installments rule. In so providing the Board reached the same conclusion as to the need for credit disclosure as did the National Conference of Commissioners on Uniform State Laws which extended

the protections of its Uniform Consumer Credit Code (hereafter referred to as the UCCC) not only to transactions in which a finance charge was separately stated but also to those in which the agreement called for multiple installments. (UCCC §§ 2.104 and 3.104). If there is any doubt about the validity of the Board's more-than-four-installment rule, surely the interpretation of the agency designated by Congress to implement the Act, the Federal Reserve Board, should be given great deference by virtue of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong". (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).) "particularly . . . when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

B. The Decision Below Introduces Such Uncertainty into the Law of Consumer Credit Disclosure as To Warrant Clarification at the Highest Judicial Level.

The decision below not only conflicts with a well-reasoned district court opinion, *Strompolos v. Premium Readers Service*, 326 F.Supp. 1100 (N.D. Ill. 1971),[3] which concluded that the multiple installment rule is a reasonable exercise of the Board's authority, but also with the provisions of the UCCC which were carefully prepared to mesh with the Act to afford consumers a uniform law of disclosure of credit terms.

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[3] Now pending before the Seventh Circuit on Interlocutory Appeal, order dated November 17, 1971, Seventh Circuit Misc. Record No. [illegible].

The UCCC was in preparation by the National Conference while Truth in Lending was being debated in Congress. The committees and staffs preparing these measures shared ideas in a cooperative effort to effect better consumer protection legislation. The Congressional purpose in promulgating Truth in Lending was to set federal standards for credit disclosure; if states met these standards, the Board was directed to exempt their laws from the Act and to allow state authorities to enforce their own disclosure laws. (15 U.S.C. § 1633). The disclosure provisions of the UCCC were carefully designed to meet the federal standards in order that states adopting the UCCC might qualify for exemption by the Board. UCCC §§ 2.104 and 3.104 define, respectively, consumer credit sales and consumer loans as those, *inter alia*, in which either a finance charge is made or the debt is paid in multiple installments. It is fair to say that a nation-wide uniform law of consumer credit disclosure was the shared objective of both the National Conference and the Congress, and in pursuance of this the UCCC contains the following provision designed to assure interstate creditors that they might operate uniformly in all states:

> Section 2.301
>
> . . .
>
> (2) The seller shall disclose to the buyer to whom credit is extended with respect to a consumer credit sale the information required by either this Part, or the Federal Consumer Credit Protection Act.
>
> (3) For the purposes of subsection (2), information which could otherwise be required pursuant to the Federal Consumer Credit Protection Act is sufficient even though the transaction is one of a class of credit transactions exempted from that Act pursuant to regu-

lation of the Board of Governors of the Federal Reserve System.

(Section 3.301 is similar for loans.)

Were the position of the Fifth Circuit in the court below sustained, the following undesirable consequences might follow:

(1) In UCCC states (currently Colorado, Idaho, Indiana, Oklahoma, Utah, and Wyoming), creditors not opting to state separately a finance charge may successfully contend that since they need not comply with Truth in Lending, the UCCC provision quoted above exempts them from having to comply with the disclosure provisions of the UCCC; hence, even in the UCCC states consumers would be denied the protection of disclosure legislation in the cases in which finance charges are buried.

(2) If the contention in (1) above is not sustained, there will be a different law of disclosure in UCCC states from that obtaining in states still governed by Truth in Lending. As a result pressure may be exerted in the UCCC states to amend the UCCC to make it conform to the Fifth Circuit's interpretation of Truth in Lending and thus to withdraw credit disclosure protection in transactions in which finance charges are not separately stated.

(3) States enacting the UCCC may no longer have laws considered substantially similar to Truth in Lending and may, therefore, not qualify for exemption pursuant to 15 U.S.C. § 1633.

C. The Decision Below Is an Erroneous Interpretation of the Act

The Board is ordered to carry out the purposes of the Act (15 U.S.C. § 1604) and this purpose is stated to be "to assure a meaningful disclosure of *credit terms* so that

the consumer will be able to compare more readily the various credit terms available and avoid the uninformed use of credit." (15 U.S.C. § 1601) (emphasis added). The Act defines "creditor" as referring to creditors who regularly extend or arrange "credit for which the payment of a finance charge is required . . . ." (15 U.S.C. § 1602(f)). It is well known that some creditors choose to bury their finance charges in the price of their product. In order to deal with this practice, which probably bears most heavily on the low-income consumer, the Board, in pursuance of its authority to assure meaningful disclosure of credit terms and "to prevent circumvention or evasion" of the Act, provided in 12 C.F.R. § 226.2(k) that the Act applies not only to transactions in which the finance charge is separately stated but also in which there is an agreement that the debt be payable "in more than 4 installments."

The decision of the court below to the effect that the Board exceeded its powers in adopting the multiple installment rule is based on the court's belief that owing to the definition of creditor in 15 U.S.C. § 1602(f) only creditors making a separate statement of finance charges are covered. Strong policy considerations calling for full disclosure of credit terms in all significant extensions of credit militate against the decision of the court below. Moreover, internal evidence within Truth in Lending shows the court erred in construing the statute.

First, "finance charge" is defined as "the sum of all charges, payable *directly* or *indirectly* by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an *incident to the extension* of credit . . ." (15 U.S.C. § 1605(a)) (emphasis added). This all-inclusive definition hardly supports the Fifth Circuit's view that a creditor who buries his finance charge is not making a charge incident to the extension of credit.

Second, "credit sale" is defined as including:

> "any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract." 15 U.S.C. § 1602(g).

The lease is the classic case in which no finance charge is separately stated; credit factors are commonly taken into consideration in fixing the rental payments. The definition of "credit sale" quoted above is largely based on Uniform Commercial Code Section 1-201(37) which determines when a lease is, in effect, a disguised sale and thus creates a security interest. It is worth noting that in the UCC cases in which leases were found to be disguised credit sales under UCC Section 1-201(37) no finance charges were separately stated.[3] If the Fifth Circuit's assumption that the Act applies only to transactions in which a finance charge is separately stated, the quoted definition of "credit sale" would be emasculated for it would limit the applicability of the Act in lease cases to a virtually nonexistent transaction —leases in which finance charges are separately stated.

Furthermore, the legislative history of Truth in Lending tends to refute the Fifth Circuit's narrow view of the meaning of finance charge as one which is separately stated. Several years of hearings on proposed Truth in Lending bills repeatedly pointed up the possibility that enactment

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[3] See, e.g., *In re Walter W. Willis, Inc.*, 313 F. Supp. 1274 (N.D. Ohio 1970), *aff'd*, 440 F.2d 995 (6th Cir. 1971); *In re Oak Manufacturing, Inc.*, 6 UCC Rep. Serv. 1273 (S.D. N.Y. 1969); *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969); *United Rental Equipment Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

of such legislation could induce some creditors, particularly those who rarely make cash sales, to pack the cost of credit into the price of their product.[4] It is significant that not until *after* these hearings was the language "payable directly or indirectly by the person to whom credit is extended" added to the definition of finance charge in the version of the bill that was finally enacted. 15 U.S.C. § 1605(a).

III. CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Fifth Circuit.

Respectfully submitted,

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[4] *See Hearings on S. 750 Before the Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency*, 88th Cong., 1st & 2d Sess. (1963-1964), pp. 13, 208-209, 436-437, 500-501, 743, 744, 794, 1014-1015; *Hearings on S. 5 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess., pp. 377-380, 513, 514-515, 600, 604-606, 699, 700-701 (1967).

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-829

LEILA MOURNING, PETITIONER
v.
FAMILY PUBLICATIONS SERVICE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, submits this brief *amicus curiae* because the important questions presented by this case which relate to the administration of the Truth in Lending Act, warrant consideration by this Court.

QUESTIONS PRESENTED

1. Whether the Federal Reserve Board acted beyond its rulemaking authority under the Truth in Lending Act in promulgating the "four installment rule" of Regulation Z, which provides that any credit transaction payable in more than four installments

is subject to the disclosure rules of the Act regardless of whether there is an identified finance charge involved in the transaction.

2. Whether the four installment rule creates a "conclusive presumption" regarding the imposition of finance charges that violates the due process clause of the Fifth Amendment to the Constitution.

STATEMENT

Under the Truth in Lending Act, 15 U.S.C. 1601-1665, creditors who regularly extend "credit" must disclose "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed," 15 U.S.C. 1631(a), information such as the cash price, the amount of the down payment, the total amount to be financed, the amount of the finance charge, and the number and amount of payments required. 15 U.S.C. 1638(a). Since creditors could easily evade the Act's requirements by ceasing to identify the finance charge while inflating their "cash" price,[1] and since the Federal Reserve Board has the duty of prescribing rules and regulations "to prevent circumvention or evasion" of the Act, 15 U.S.C. 1604, the Board's Regulation Z includes within the class of covered creditors any creditor who extends credit in a transaction where repayment, pursuant to an agreement, is or may be made in more than four installments. 12 C.F.R. 226.2(k).

[1] Federal Reserve Board letter, No. 86, August 26, 1969, from J. L. Robertson, Vice-Chairman, Board of Governors, Federal Reserve Board, summarized 1 C.C.H. Consumer Guide ¶ 30,457. See also Federal Reserve Board letter, July 24, 1969, 1 C.C.H. Consumer Credit Guide, ¶¶ 30,113, 30,114; and note 11, *infra*.

Petitioner Leila Mourning brought this action in the United States District Court under the Act, 15 U.S.C. 1640, alleging that on August 19, 1969, she entered into a written contract with Family Publications Service, Inc. (hereinafter FPS) for the purchase of magazines; that in addition to her down-payment of $3.95 the contract obligated her to make thirty monthly payments of $3.95 each in return for a sixty months' subscription to four magazines; and that FPS failed to disclose the total purchase price of the magazines, the unpaid balance and other matters, as required by Regulation Z, 12 C.F.R. 226.8 and the Act, 15 U.S.C. 1638.

On cross-motions for summary judgment the district court held that FPS had violated the Truth in Lending Act and Regulation Z by extending credit in a transaction involving more than four installment payments without making the required disclosures (Pet. App. 3a–5a). The court found that FPS had extended "consumer credit" within the meaning of the Act, 15 U.S.C. 1602; see 12 C.F.R. 226.2(k): FPS had given petitioner a sixty-month subscription in exchange for a promise to pay a specified sum in thirty monthly installments; the contract provided that it could not be cancelled and that failure to make monthly payments would render the entire balance due; and FPS itself considered the transaction to be a credit transaction (Pet. App. 4a). Pursuant to the Act's civil penalty provision, 15 U.S.C. 1640(a), the court awarded petitioner $100 together with attorney's

fees of $1,500 (Pet. App. 5a).[3] The district court did not question the validity of the four installment rule in Regulation Z.

The court of appeals reversed, holding that the Board had exceeded its statutory authority in promulgating the four installment rule (Pet. App. 6a–23a).[4] In the court's view, the Act "requires that a finance charge must be found present, directly or indirectly," in a transaction before the creditor is subject to the disclosure rules (Pet. App. 19a). But under the Board's four installment rule, disclosure is required "whether or not there is found in such transactions the imposition of a finance charge as an incident to the extension of credit" (*id.*). The court therefore held that the Act did not authorize the Board's regulation.

The court of appeals also held that the four installment rule created a "conclusive presumption" that a finance charge had been imposed, that such a conclusive presumption violates the due process clause of the Fifth Amendment, and that Congress itself thus could not have validly enacted the four installment rule. The court accordingly held the Board's rule void (Pet. App. 21a–23a).

[3] The civil penalty in actions brought by consumers is set by the Act at "twice the amount of the finance charge * * * except that the liability * * * shall not be less than $100 nor greater than $1,000." 15 U.S.C. 1640(a)(1).

[4] The court of appeals did not pass on the question whether FPS had extended credit as the district court found.

INTEREST OF THE UNITED STATES

The court of appeals has invalidated a significant regulation designed to prevent evasion and circumvention by creditors of their consumer protection obligations under the Truth in Lending Act. The Federal Reserve Board has the duty of promulgating rules and regulations, such as that involved in this case, in order to secure compliance with the Act, 15 U.S.C. 1604, and the Federal Trade Commission has general enforcement responsibilities under that Act,[4] 15 U.S.C. 1607(c).[5] Both agencies believe that the decision below will impair public and private enforcement of the Act[6] and will significantly impede full realization of the Act's goal of assuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601.

DISCUSSION

This case presents important questions regarding the Truth in Lending Act. The court of appeals has invalidated the Board's regulation requiring disclo-

[4] Other federal agencies have specific enforcement responsibilities in limited areas. 15 U.S.C. 1607(a).

[5] A violation of the Truth in Lending Act is a violation of the Federal Trade Commission Act, 15 U.S.C. 1607(c).

[6] Under 15 U.S.C. 1640, consumers may sue creditors for violations of the Act in any court of competent jurisdiction.

sure by creditors in transactions without identified finance charges. The Board adopted this regulation in order to protect consumers making installment purchases, a method of buying that has markedly increased in popularity over the years and has given rise to a $107 billion consumer credit industry.[7] The court's decision releases an entire class of creditors—"no-charge-for-credit" vendors—from the Act's disclosure requirements. Yet these are the kinds of creditors commonly operating in areas of maximum consumer abuse, such as land sales, home improvement contracts, ghetto sales of furniture, appliances and jewelry, correspondence schools, health spas, magazine subscription services and various door-to-door sales.

Currently, at least eight cases involving the issue presented by this case are pending in the trial courts;[8] another case is before the United States Court of Appeals for the Seventh Circuit on appeal from the district court's decision upholding the validity of the

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[7] This figure represents the total amount of outstanding installment consumer credit as of November 1971. *Federal Reserve Board Statistical Release*, G. 19 (Jan. 4, 1972).

[8] *Smith* v. *International Magazines Service* (D. W. Va., Civil Action No. 71-16-F); *Angel Padilla* v. *Patricia Cifarelli, d/b/a Mr. Dominick Auto Sales* (D. Conn., No. 14752); *Luis Acevedo* v. *Patricia Cifarelli, d/b/a Mr. Dominick Auto Sales* (D. Conn., Civil Action No. 14753); *Martin* v. *Family Publications Service* (D. Vt., Civil Action No. 5829); *Esposito* v. *Alan Nayer, d/b/a Educational Book Club of Maine* (D. Maine, Civil Action No. 11-142); *Rodrigues* v. *Family Publications Service, Inc.* (C.D. Calif., Civil Action No. 71-543-AAH); *Marques* v. *Family Publications Service* (W.D. Texas, No. SA 70 CA 356); *Baxter* v. *Holiday Spa* (Circuit Ct. for the 17th Judicial Circuit of Ill., No. G-26067).

four installment rule.[8] The Federal Trade Commission is withholding action on proposed complaints based on the four installment rule pending the outcome of this case. Uniform application of this important consumer protection statute, although essential, will not be possible in light of the decision of the court of appeals. Creditors throughout the country, particularly those with nationwide operations, are unsure about their disclosure obligations in transactions covered by the four installment rule. Only this Court can end the current uncertainty and confusion generated by what is in our view an erroneous decision that has serious implications regarding effective implementation of the Truth in Lending Act.

1. The purpose of the disclosure provisions of the Truth in Lending Act is to enable consumers to make informed judgments about the use of credit. 15 U.S.C. 1601. The Act requires that creditors make certain disclosures to consumers "upon whom a finance charge is or may be imposed." 15 U.S.C. 1631. "Finance charge" is defined as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. 1605(a).

Contrary to the holding of the court of appeals, the Act does not say that "there must be found present a 'finance charge' as defined by the Act" in order for consumer credit transactions to be covered by

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[8] *Strompolos* v. *Premium Readers Service*, 326 F.Supp. 1100 (N.D. Ill.).

the disclosure obligations (Pet. App. 16a). The Act is applicable if a finance charge "may be imposed"; it is sufficient that the nature of the transaction renders the presence of such a charge likely. Disclosure of all required information is to be made at the outset, when the existence of a finance charge may not be apparent; the creditor is not to await the consumer's discovery of hidden charges before fulfilling his disclosure obligations. The very purpose of the Act is to relieve consumers of the burden of discovering such matters so that they will be assured of having sufficient information to decide whether to enter into the credit transaction.

Moreover, "finance charge," as defined in 15 U.S.C. 1605(a), is not limited to clearly identified charges. Congress recognized that the relationship between finance charges and the consumer credit transaction may often be attenuated and that this might preclude identifying actual finance charges in all cases. Thus "finance charges" include charges "indirectly" payable by the consumer and "indirectly" imposed by the creditor.

The foregoing provisions, together with the Board's regulatory authority, serve as the basis for the four installment rule. In passing the Truth in Lending Act Congress legislated in a relatively unregulated field. Realizing that if the Act is to be effective, creditors must be prevented from evading their statutory obligations, Congress entrusted the Federal Reserve Board with the task of formulating rules and regulations to secure compliance. The Board is authorized to issue regulations which "may contain such classifica-

tions, differentiations or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this [Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. 1604.[10]

After enactment of the Truth in Lending Act, the Board established a task force, including outside consultants experienced in the various aspects of consumer credit, for the purpose of drafting proposed regulations consistent with the Act's provisions and purposes. The Board received more than 1200 comments on the proposed regulations, which included the four installment rule, from industry, consumer groups, and federal and state agencies. The Board concluded that the four installment rule was necessary to prevent widespread evasion of the Act.[11] Without such a rule, sellers who transacted most of their business by extending long term credit could easily evade the Act's disclosure requirements by des-

[10] In one area for potential evasion, Congress dealt with the problem directly. Congress recognized that, since the Act would apply in general only in connection with sales of goods and services, sellers might attempt to modify the form of their contracts from sales to leases or bailments for the purpose of avoiding coverage. The Act therefore defines "credit sales" to include leases and bailments that are disguised conditional sales contracts, even though leases and bailments typically do not involve identified finance charges. 15 U.S.C. 1602(g).

[11] See Statement of Board Vice-Chairman J. L. Robertson, Hearings before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 91st Congress, 1st Sess., Part II, at 377–380.

ignating a theoretical cash price equal to the total price for an installment purchase, thereby giving the appearance that no finance charges were being imposed. See *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100, 1103 (N.D. Ill.). Moreover, when a creditor regularly extends long term credit it is probable that he is imposing a finance charge, even though it is not identified as such: when the consumer defers payments, the seller incurs a cost and that cost is likely to be passed on to the consumer. Thus, a finance charge "may be" imposed in this type of transaction. In addition, if each transaction had to be dissected after the fact in order to determine the existence of buried finance charges, there would be endless disputes over bookkeeping practices and other matters far-removed from the central purposes of the Act. The Board justifiably rejected any such approach in light of the great difficulties in administration and the lack of uniformity that would be bound to arise.

Where, as here, Congress has enacted remedial legislation and conferred broad rule-making authority upon an expert agency, the construction of the statute by that agency in regulations adopted after careful study is entitled to great weight. See *Thorpe* v. *Housing Authority*, 393 U.S. 268; *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315. As discussed above, the Board's four installment rule is authorized by the Act and is "not only sensible

but also necessary to prevent the Truth in Lending Act from becoming a hoax and delusion upon the American public." *Strompolos* v. *Premium Readers Service, supra,* 326 F. Supp. 1103. The court of appeals erred in holding otherwise.

2. The court of appeals also erred in holding the four installment rule unconstitutional (Pet. App. 21a–23a). In the court's view, the Board's rule violated the due process clause of the Fifth Amendment because it established a "conclusive presumption" that the creditor had imposed a finance charge. But characterizations cannot serve as a substitute for analysis.

What matters is whether the rule of law embodied in the Board's four installment regulation [12] is rationally founded pursuant to the Act. See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152. In our view, there is no doubt that the Board's rule meets that test. The only burden imposed on creditors is disclosure. In light of the substantial danger of evasion and circumvention in the absence of the four installment rule, the benefits to consumers from that rule and the great difficulty in administering the Act if a transaction-by-transaction approach were followed, the Board had ample justification for exercising its regulatory authority as it did.

[12] The Act provides that any reference to the requirements of the Act includes "reference to the regulations of the Board." 15 U.S.C. 1602(q).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

[illegible] Court of the United States

OCTOBER TERM, 1971

No. 71-[illegible]

LEILA [illegible],

Petitioner,

v.

[illegible] PUBLICATIONS SERVICE, INC.,

Respondent.

[illegible] FOR A WRIT OF CERTIORARI TO THE UNITED [illegible]
[illegible] OF APPEALS FOR THE NINTH CIRCUIT

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CONCLUSION

For the foregoing reasons, the petition for a of certiorari should be granted.

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IN THE

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OCTOBER TERM, 1971

No. 71-829

LEILA MOURNING,
Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 25, 1972.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida is reported at 4 CCH CONSUMER CREDIT GUIDE ¶ 99,632 (1970) (Mehrtens, J.). The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the District Court, is reported at 449 F.2d 235 (1971).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971. The petition for a writ of certiorari was filed on December 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether transactions in which consumers prepay for goods involve an extension of consumer credit within the meaning of the Truth in Lending Act (15 U.S.C. §§ 1601-65 (1970)) and Regulation Z (12 C.F.R. §§ 226.1-.12 (1971)) promulgated thereunder by the Federal Reserve Board.

2. Whether transactions that do not entail any finance charges are subject to the civil and criminal penalties of the Truth in Lending Act by virtue of the Federal Reserve Board's four installment rule.

3. Whether, under 15 U. S. C. § 1640(a) (which provides for a penalty equal to "twice the amount of the finance charge in connection with the transaction except . . . [not] less than $100 nor greater than $1,000"), a penalty may be imposed where the transaction in question does not entail a finance charge.

STATUTES AND REGULATIONS INVOLVED

The statute to be construed is the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970).[1] The regulation to be construed is to be found in Regulation Z, 12 C.F.R. §§ 226.1-.12 (1971), promulgated by the Federal Reserve Board.

The Act provides, in pertinent part, as follows:

> "§ 1601. Congressional findings and declaration of purpose
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged

in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."

"§ 1602. Definitions and rules of construction

. . . .

(e) The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term 'credit sale' refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract."

"§ 1605. Determination of finance charge—Definition

(a) Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges."

"§ 1607. Administrative enforcement—Enforcing agencies

(a) Compliance with the requirements imposed under this subchapter shall be enforced under

(1) section 1818 of Title 12, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) sections 1426(i), 1437, 1464(d), and 1730 of Title 12, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act."

"§ 1611. Criminal liability for willful and knowing violation

Whoever willfully and knowingly

(1) gives false or inacurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 1606 of this title in such a manner as to consistently understate the an-

nual percentage rate determined under section 1606(a)(1)(A) of this title, or

(3) otherwise fails to comply with any requirement imposed under this subchapter,

shall be fined not more than $5,000 or imprisoned not more than one year, or both."

"§ 1612. Penalties inapplicable to governmental agencies

No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision."

"§ 1631. General requirement of disclosure

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part."

"§ 1633. Exemption for State-regulated transactions

The Board shall by regulation exempt from the requirements of this part any class of credit transactions within any State if it determines that under the law of that State that class of transactions is subject to requirements substantially similar to those

imposed under this part, and that there is adequate provision for enforcement."

"§ 1640. Civil liability—Failure to disclose

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court."

Regulation Z provides, in pertinent part, as follows:

"§ 226.2 Definitions and rules of construction

For the purposes of this part, unless the context indicates otherwise, the following definitions and rules of construction apply:

. . . .

(d) 'Amount financed' means the amount of credit of which the customer will have the actual use determined in accordance with paragraphs (c)(7) and (d)(1) of § 226.8.

. . . .

(k) 'Consumer credit' means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments. 'Consumer loan' is one type of 'consumer credit.'

(l) 'Credit' means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

(m) 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

(n) 'Credit sale' means any sale with respect to which consumer credit is extended or arranged by the seller."

"§ 226.8 Credit other than open end—specific disclosures

(a) *General rule*. Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969."

STATEMENT OF THE CASE

Respondent, Family Publications Service, Inc. ("FPS"), was engaged in the business of soliciting subscriptions and offering contracts for the delivery of a large number of well-known national periodicals. (Pet. App. 7a*.) Under FPS's standard form of contract, a customer receives the magazines he selects for 48 (or 60) months and pays for them monthly over the first 24 (or 30) months.** Under this plan, at any point in time prior to the end of the contract period, the customer has paid for more issues than he has received, so that FPS is not in any sense financing a debt for, or "carrying", the customer. The payments are in fact prepayments by the customer for magazines to be delivered to the customer in the future. Petitioner did not contend and the district court did not find that FPS's contract imposes any finance charge on the customer. (Pet. App. 12a.)

Under the terms of the FPS contract executed by petitioner on August 19, 1969, she was to receive Ladies Home Journal, Holiday, Life, and Travel and Camera for 60 months in return for an initial payment of $3.95 and 30 monthly payments of $3.95. Although she received the magazines ordered, petitioner defaulted on her contract and never made any payments beyond the initial $3.95 payment. Consequently, her contract was cancelled by FPS on April 15, 1970. (Pet. App. 8a.)

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*References cited to "Pet. App." are to the opinions of the district court (Pet. App. 1a-5a) and the court of appeals (Pet. App. 6a-23a) which are printed in the Petitioner's Appendix.

**In a relatively small number of cases FPS's customers elected to pay the full purchase price at the outset rather than over 24 (or 30) months. We have recently discovered that, contrary to representations made below, a small number of those customers (representing a small fraction of 1% of FPS's total customers) may have been charged less than the aggregate purchase price under FPS's standard form of contract.

Petitioner Mourning commenced this action in the United States District Court for the Southern District of Florida on April 22, 1970, on her own behalf and on behalf of a class comprised of all residents of Dade County, Florida, who had entered into contracts with FPS since July 1, 1969 (the effective date of the Truth in Lending Act). The second amended complaint ("the complaint") alleged that the FPS standard form contract did not contain the disclosure of credit terms required by the Truth in Lending Act and the Regulations promulgated thereunder by the Federal Reserve Board. The complaint prayed for a civil penalty of not less than $100 nor more than $1,000 on behalf of each member of the class, together with attorneys' fees and the cost of the action, as provided for in 15 U.S.C. § 1640(a).

The Act provides that creditors who extend consumer credit "for which the payment of a finance charge is required" (15 U.S.C. § 1602 (f)) shall make specified disclosures (15 U.S.C. § 1631), including the amount of the finance charge and the finance charge expressed as an annual percentage rate. Regulation Z promulgated by the Federal Reserve Board provides that such disclosures must be made in credit transactions involving repayment in more than four installments, regardless of whether a finance charge is involved (12 C.F.R. §§ 226.2 (k) and (m), 226.8). For failure to make the required disclosures, the Act imposes both criminal (15 U.S.C. § 1611) and civil penalties (15 U.S.C. § 1640), as well as administrative sanctions under the Federal Trade Commission Act (15 U.S.C. § 1607). The civil penalty section of the Act, under which petitioner's claim arises, provides for liability

> "in an amount equal to . . . twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall

not be less than $100 nor greater than $1,000 . . . ."
15 U.S.C. § 1640.

On August 28, 1970, both parties moved for summary judgment. Petitioner contended that her transaction with FPS was subject to the Act by virtue of Regulation Z because it was a credit transaction payable in more than four installments and that she was entitled to recover a civil penalty regardless of whether the transaction entailed a finance charge. FPS contended that the transaction was not subject to the disclosure and penalty provisions of the Act because, *inter alia,* (1) it was not a credit transaction, (2) the disclosure and penalty provisions of the Act do not apply in the absence of a finance charge, and (3) the Regulations could not extend the scope of the Act. Both parties concurred in the view that there were no material issues of fact and that the sole question to be decided was the proper reach of the disclosure and penalty provisions of the Act and the Regulations.

On November 27, 1970, the district court rendered its final decision (1) dismissing the class allegations in the amended complaint, (2) denying FPS's motion for summary judgment, and (3) granting judgment in favor of Leila Mourning in the amount of $100, together with $1,500 attorney's fee and costs. The court held that "the transaction here in question falls squarely within the scope of the Act and its Regulations *by virtue of the 'more than four installments' rule,* 12 CFR § 226.2(k). . . ." (Pet. App. 4a) (emphasis added).

On December 11, 1970, FPS filed its notice of appeal from the district court's order and the judgment entered thereon in so far as the order granted plaintiff's motion for summary judgment and denied FPS's motion for summary judgment.

On September 27, 1971, the court of appeals reversed and remanded with directions that the complaint be dismissed. The court found that under the Act "three essential elements must be found present together in a transaction" before the duty to make the specified disclosures arises: (i) a creditor (ii) who extends consumer credit (iii) for which a finance charge has been imposed (Pet. App. 17a-18a). The court also found, in accord with the position taken by the United States as amicus curiae, that under the regulation promulgated by the Federal Reserve Board

> "in order for the disclosure and penalty provisions of the Truth-in-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required." (Pet. App. 18a.)

The court concluded that "an inconsistency exists between the four installment rule and the Truth-In-Lending Act" and that, in promulgating the rule, the Board had "over-stepped the authority granted to them under 15 U.S.C., § 1604". (Pet. App. 19a) Relying on this Court's decisions in *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87 (1959), and similar cases, the Court of Appeals held that the Board's rule constituted an invalid "administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment." (Pet. App. 20a.)

Having found the Act inapplicable to the transaction in issue by reason of the invalidity of the four installment rule, the court of appeals did not find it necessary to con-

sider FPS's further contentions (1) that the Act is inapplicable because FPS did not extend consumer credit but rather was prepaid by its customers, and (2) that the civil penalty provision of the Act, providing for a penalty equal to "twice the amount of the finance charge imposed", is inapplicable where the transaction in question does not involve a finance charge.

ARGUMENT

The decision below is clearly correct. It is not in conflict with the decision of any other court of appeals. Moreover, the decision below is sustainable on independent grounds not reached by the court below. Accordingly, further review is not warranted.

1. The court of appeals was clearly correct in concluding that the four installment rule is inconsistent with the Act and, therefore, invalid. The declared congressional purpose in enacting the Truth in Lending Act was to assure "[t]he informed use of credit [which] results from an awareness of the *cost* thereof by consumers". 15 U.S.C. § 1601 (1970) (emphasis added). Contrary to petitioner's assertion (Pet. 9), the Act does not require disclosure in all credit transactions, but only in credit transactions involving a finance charge. Three separate sections of the Act reiterate the finance charge requirement and make the congressional purpose clear beyond doubt. Section 1602(f) provides in applicable part:

> "The term 'creditor' refers *only* to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a *finance charge* is required . . . ." (Emphasis added.)

The disclosure requirement set forth in § 1631(a) provides:

> "Each creditor [as defined in § 1602 (f)] shall disclose clearly and conspicuously, in accordance with the regulations of the [Federal Reserve] Board, to each person to whom consumer credit is extended and upon whom a *finance charge* is or may be imposed, the information required under this part." (Emphasis added.)

Finally, under § 1640(a), the civil liability for failing to make the required disclosures is stated to be "twice the amount of the *finance charge* in connection with the transaction", (emphasis added) provided that such liability shall not be less than $100 nor more than $1,000.

The clear language of the Act is buttressed by the Act's legislative history. Both the House and Senate reports reflect the intent to limit the application of the Act to transactions involving a finance charge:

> "[15 U.S.C. § 1631] . . . is a prefatory section setting forth the basic requirements to disclose. It is similar to the original S.5, except that it is made clear that disclosure need only be made to persons 'upon whom a finance charge is or may be imposed.' Thus, *the disclosure requirement would not apply to transactions* which are not commonly thought of as credit transactions, including trade credit, open account credit, 30-, 60-, or 90-day credit, etc., *for which a charge is not made.*" S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H.R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967) (emphasis added).

The same intent is reflected in the House report:

> ". . . Title I is intended to provide the American consumer with truth-in-lending and truth-in-credit ad-

vertising by providing full disclosure *of the terms and conditions of finance charges* both in credit transactions and in offers to extend credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 1 (1967) (emphasis added).

During the 1964 hearings before the Senate Banking and Currency Committee's Subcommittee on Production and Stabilization, the Chairman of the Federal Trade Commission explained the application of the Act as follows:

> "First, there must be a transaction involving 'credit' as defined in section 3(2). Second, a 'finance charge' as defined in section 3(3) must be imposed in this transaction involving 'credit' as defined in section 3(2). Third, only a 'creditor' as defined in section 3(4) is required to make the disclosure required under this act.
>
> "In order to determine whether any transaction which involves credit within the meaning of section 3(2) falls within the scope of the bill, it is necessary to inquire whether a 'finance charge' is imposed; i.e., whether the borrower or credit purchaser is required to pay any amount which would not be incurred in a cash transaction." *Hearings on S. 750 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking and Currency,* 88th Cong., 1st & 2d Sess., pt. 2, at 1304 (1964).

Thus, the Fifth Circuit's observation that "there must be found present a '*finance charge*'" before disclosure is required under the Act (Pet. App. 18a) is clearly correct. *See Castaneda* v. *Family Publications Service,* 4 CCH Consumer Credit Guide ¶ 99,564 (D. Colo. 1971); *cf. Otis* v. *Cowles Communications, Inc.,* No. C-71-550 RHS (N. D. Cal., Nov. 3, 1971). *See also Martinez* v. *Family Publications Service, Inc.,* No. 71-169-CIV-TC (S. D. Fla.,

Oct. 8, 1971). Each of those cases involved transactions identical in all material respects to the one in issue here.

There can be no doubt that the four installment rule seeks to expand the coverage of the Act. The district court held that the transaction in issue was subject to the disclosure requirements solely by virtue of the four installment rule. In other words, this transaction is not reached by the Act alone. Neither the petitioner nor the amici here seriously contend otherwise. Petitioner urges that the Board has "the power to reach transactions just *outside* the literal reach of the statute" (Pet. 15) (emphasis added).

While the Federal Reserve Board which promulgated Regulation Z has broad powers to *implement* the Act, it clearly does not have authority to *extend* the Act—and its civil and criminal penalties—to broad categories of transactions that Congress did not reach and declared an intention not to reach.* The principles upon which the courts are to deal with the over-zealous efforts of administrative agencies to remedy what they deem to be the shortfalls of congressional enactments have been well settled by this Court and were scrupulously followed by the court below. Thus, in *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U. S. 284 (1954), this Court struck down an FCC regulation intended to prevent the "circumvention" and "evasion" of the statutory prohibition of the broadcast of lotteries. The Court stated:

> "It is apparent that these so-called 'give-away' programs have long been a matter of concern to the Federal

---

*Another provision of Regulation Z (12 C.F.R. § 226.9 (1971)) has recently been held invalid for attempting to enlarge the scope of the Act. *N. C. Freed Co.* v. *Board of Governors of the Federal Reserve Sys.*, 4 CCH Consumer Credit Guide ¶ 99,356 (W.D.N.Y. 1971).

Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and gambling spirit. . . . Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy." 347 U. S. at 296-97.*

See *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944). *See also Zuber* v. *Allen*, 396 U. S. 168 (1969); *United States* v. *Calamaro*, 354 U.S. 351 (1957); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369-70 (1945).

The freewheeling administrative power, advocated by petitioner, to "correct any [congressional] oversights or omissions" (Pet. 13) is peculiarly inappropriate in the circumstances of the Truth in Lending Act. Contrary to petitioner's assertion, the Act is not a mere "rough outline" (Pet. 13) of what Congress had in mind. Perusal of the Act discloses that it is an extremely detailed statute that sets forth with precision the matters within and without its

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*As here, the Court in *FCC* v. *American Broadcasting Co.* was faced with a civil case under a statute which also provided for criminal penalties. The Court observed:

"It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly." 347 U. S. at 296.

coverage.* *See Ebert* v. *Poston*, 266 U.S. 548, 554 (1925) ("Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions.").

Furthermore, the supposition that, but for the four installment rule, undisclosed finance charges would remain undisclosed is absurd. The very purpose of the Act was to require the disclosure of undisclosed finance charges. To suggest that, in order to achieve that purpose, the Board had to eliminate a prerequisite to the Act's applicability explicitly imposed by Congress is to suggest an extraordinary incapacity of Congress to express its will.

The Petition also urges that the four installment rule reflects

> "the Board's apparent conclusion that it would not be feasible to determine for categories of transactions or on a case by case basis when the price paid by the consumer includes, purposely or otherwise, part of [*sic*] all of the costs necessarily incurred by the creditor in extending credit." (Pet. 17.)

Neither the petitioner nor the amici, however, explain how such indirect and unidentifiable credit costs are to be identified and accurately disclosed by those who would be

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*For example, § 1638(a)(7) provides for the disclosure of

> "The finance charge expressed as an annual percentage rate except in the case of a finance charge
>
> (A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or
>
> (B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.
>
> A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph."

brought within the Act's coverage solely by virtue of the four installment rule. Yet it is clear that, if the Act is applicable, the failure to make such identification and disclosure with precision entails the risk of "millions of dollars in statutory damages" (Pet. 19), as well as criminal and administrative sanctions. Whatever validity the rule might have if it created merely a rebuttable presumption of the presence of a finance charge, neither the petitioner nor the amici explain what legislative purpose can be served by an irrebuttable presumption that, in effect, requires the disclosure of finance charges by creditors who do not impose finance charges. Since Congress explicitly recognized that some creditors do not impose finance charges (*see* 15 U.S.C. § 1602(f) and pp. 13-15, *supra*), the avowed purpose of the regulation is patently inconsistent with the congressional purpose.

In all events, we note that on January 3, 1972, the Federal Reserve Board recommended that Congress amend the Truth in Lending Act by enacting the four installment rule. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT TO CONGRESS ON TRUTH IN LENDING FOR THE YEAR 1971, at 22 (1972). Thus, Congress has had the supposed defect in the Act formally called to its attention and has had the opportunity to deal with it. We respectfully submit that Congress is the appropriate forum for the resolution of the question that petitioner urges upon the Court.

2. There is no conflict among the circuits. *Strompolos v. Premium Readers Service,* 326 F. Supp. 1100 (N.D. Ill. 1971), is cited by petitioner as being in direct conflict with the Fifth Circuit's decision in this action. However, *Strompolos* although certified by Judge Will under 28 U.S.C. § 1292(b) was settled on appeal before the Seventh Circuit Court of Appeals could consider the ruling below. Accordingly, there is no conflict between the circuits. More-

over, the other district courts which have considered the issues present here have all concurred with the Fifth Circuit. *See Otis* v. *Cowles Communications, Inc.*, No. C-71 550 RHS (N.D. Cal., Nov. 3, 1971) (motion for summary judgment granted on the ground that according to the undisputed facts, identical in all material respects to those present here, the Truth in Lending Act was inapplicable to the transactions in question); *Martinez* v. *Family Publications Service, Inc.*, No. 71-169-CIV-TC (S.D. Fla., Oct. 8, 1971) (Cabot, J.); *Castaneda* v. *Family Publications Service*, 4 CCH CONSUMER CREDIT GUIDE ¶ 99,564 (D. Colo. 1971) ("The Court finds that the defendant, in carrying on its business of selling subscriptions to magazines, was not extending consumer credit to consumers upon whom a finance charge is or may be imposed and is not subject to the Act. The defendant is entitled to summary judgment of dismissal.")

3. Although the decision of the court of appeals is based entirely on the invalidity of the four installment rule, the judgment is sustained by two independent considerations that were advanced by FPS but which the court did not reach. Since either of those grounds would, we believe, require affirmance, this case could well be disposed of without reaching the question of the invalidity of the four installment rule—the only question as to which the petitioner and the amici seek review in this Court. *See, e.g.*, *Langnes* v. *Green*, 282 U.S. 531, 538 (1931).

First, irrespective of whether the disclosure and administrative enforcement provisions of the Truth in Lending Act are applicable in the absence of a finance charge, the civil liability provision of the Act is inapplicable. That provision (15 U.S.C. § 1640(a)) specifies the recovery of an amount equal to

> "twice the amount of the finance charge in connection with the transaction, except that the liability

under this paragraph shall not be less than $100 nor greater than $1,000 . . . ."

Under § 1640(a) the finance charge provides the measure of recovery. The minimum and maximum dollar amounts cannot reasonably be construed as providing an alternative means of determining the amount of a recovery in the absence of a finance charge because the language of § 1640(a) is not susceptible of an "either/or" interpretation. Indeed, Congress rejected a bill which provided for liability "in the amount of $100, *or* in any amount equal to twice the finance charge . . . whichever is the greater [up to $1,000]". S. 5, 90th Cong., 1st & 2d Sess. § 7(a)(1) (1967) (emphasis added).

Second, the Truth in Lending Act is inapplicable to the transaction in question for the fundamental reason that the transaction did not involve the extension of credit by FPS to Mourning.* It is the essence of a credit transaction that one party parts with value in reliance on the promise of another to pay at a later date. Under the standard FPS contract, however, FPS does not deliver anything in advance of payment. Quite the contrary, the customer pays in advance for the subsequent receipt of magazines. The customer pays over 30 months for magazines he will receive over 60 months. Thus, until the last magazine has been delivered at the end of the 60-month period, the customer has paid for more magazines than he has received. In short, it is the customer who extends credit to FPS and

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*In the amicus curiae brief submitted by the United States in the court of appeals by direction of the Solicitor General, the government declined to express its opinion as to "the threshhold [sic] question presented by the case (*i.e.*, whether the magazine transaction involved the . . . extension of credit) . . . ." The government stated:

> Since the validity of the four-installment rule is unrelated to that question, the Board has no interest in urging that it be decided one way or the other." (Brief, p. 13.)

It is clear from the opinion below that the court of appeals did not make any determination with respect to that question.

not vice versa. FPS enjoys the use of its customers' money during the period between receipt of payment and delivery of magazines. Obviously, if FPS should default in its performance under its contracts, its customers would be entitled to get their money back. In bankruptcy, FPS's customers would be its largest class of creditors. If, on the other hand, a customer defaults, FPS can make itself whole merely by terminating deliveries.

Petitioner points out (Pet. 16):

> "As a practical matter any creditor who permits a customer to defer payment of an obligation for goods or services already provided or paid for by the creditor must as a consequence borrow from a third party or his own capital reserves and incur a finance charge or resulting loss of interest."

Substantially the same point is made to this Court by the United States (Brief for the United States as Amicus Curiae, p. 10). That proposition, offered in explanation of the purpose of the Act, serves to demonstrate why the Act is inapplicable here. FPS does not permit "a customer to defer payment of an obligation for goods or services *already provided or paid for*" by FPS.* Consequently, FPS does not need to "borrow from a third party or [use its] own capital reserves". FPS does not itself, therefore, "incur a finance charge or resulting loss of interest". Accordingly, FPS does not experience a cost of credit that it must pass on to its customers.

Nor does the fact that the customer contracts to make periodic payments turn his obligation into a credit obligation. There are many contractual relationships which are not credit relationships. As Professor Corbin has stated:

*There is nothing in the record that suggests that FPS pays the magazine publishers prior to receiving payment from its customers. The fact is that FPS generally pays publishers on a monthly basis over 30 months or more.

> "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered. Thus, a seller contracts to deliver wheat straw at the rate of three specified loads per fortnight, for the price of thirty-three shillings per load, payable on delivery; simultaneously with each delivery, the full price of each load is to be paid. Both parties promise to perform in instalments; but neither one promises any performance in advance of its exact agreed equivalent. Neither one risks an actual performance upon the mere word of the other." 3A A. CORBIN, CONTRACTS § 687 (1960) (footnote omitted).

In sum, a promise to make periodic deliveries in exchange for a promise to make periodic payments does not in itself give rise to a credit transaction. Obviously the fact that the FPS customer completes his periodic payment obligations under the contract before FPS has completed its performance can only show that this transaction is even less like a credit transaction than the one described by Professor Corbin.

The Act adopts the common understanding of a credit transaction.* The Act defines the term "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment". 15 U.S.C.

*"[The] disclosure requirements would not apply to transactions which are not commonly thought of as credit transactions. . . ." S. REP. No. 392, 90th Cong., 1st Sess. 14 (1967); H.R. REP. No. 1040, 90th Cong., 1st Sess. 25 (1967). "It did not attempt to alter or amend the pattern of legal rights and remedies afforded consumers and creditors under state law." 114 CONG. REC. 14487 (1968) (remarks of Senator Proxmire).

§ 1602(e). In the type of transaction in issue, there is no deferred payment but rather a prepayment by the customer because the customer has always paid for more magazines than he has received.

Moreover, there is clearly no "debt" within the meaning of the Act. A debt results from an unconditional agreement to pay and is to be distinguished from the obligations of a contract under which the performance of both parties lies in the future. *See, e.g., United States* v. *New York, New Haven and Hartford Railroad Co.*, 276 F.2d 525, 530 (2d Cir. 1959), *cert. denied*, 362 U.S. 961, 964 (1960); *McGee* v. *Stockes' Heirs*, 76 N.W.2d 145, 156 (N.D. 1956). A debt is not merely an agreement to pay money. *Evans* v. *Kroh*, 284 S.W.2d 329, 330 (Ky. Ct. App. 1955); *Park & 46th St. Corp.* v. *State Tax Commission*, 295 N.Y. 173, 178, 65 N.E.2d 763, 765 (1946). Thus, for example, in deciding whether a municipality's contract to pay for water services resulted in indebtedness in excess of the permissible debt limit, the Supreme Court in *Walla Walla City* v. *Walla Walla Water Co.*, 172 U.S. 1, 20 (1898), made the following distinction:

> "There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party performs the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment postponed."

See also Metropolitan Water District of Southern California v. Marquardt, 59 Cal. 2d 159, 379 P.2d 28, 28 Cal. Rep. 724 (1963).*

The district court rested its conclusion that FPS extended credit to petitioner on three propositions: (1) "[t]he promise to pay is unconditional and non-cancellable"; (2) "the written agreement provides that '[p]ayments due monthly, otherwise balance due' "; and (3) "Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff." (Pet. App. 4a.) The first proposition is incorrect. The second and third propositions do not support the conclusion reached.

In the first place, petitioner's promise to pay was not unconditional. Certainly, if petitioner had not received her magazines, no court would have required her to continue making payments for them. Her promise was conditional on performance by FPS and thus did not create a debt. *See* 3A A. CORBIN, CONTRACTS § 687 (1960).

In the second place, the fact that under the agreement FPS could require payment of the full balance if petitioner became indebted to FPS through her default does not show that FPS undertook to extend credit. On the contrary, the "balance due" clause only underscores FPS's determination that it not be put in the position of a creditor, either voluntary or involuntary, and that the customer be held to her initial undertaking for prepayment.

Finally, the district court's statement that FPS "considered the transaction to be a credit transaction, and that

*The term "debt" is given the same construction for federal income tax purposes as the Supreme Court gave it in *Walla Walla*. There is no valid debt which would allow a bad debt deduction under § 166 of the Internal Revenue Code unless there is an ***unconditional*** obligation of another to pay the taxpayer. See cases collected in 5 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 30.03 n.29 (1969). The existence of a note is not in itself conclusive of the existence of a debt. *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 530 (1946).

it was owed a debt by the Plaintiff" presumably refers to collection letters sent petitioner after she failed to make payments. Surely the fact that petitioner became indebted when she failed to pay, although she was receiving the magazines she had ordered, does not show that the contract provided for the creation or deferment of such debt. Petitioner's breach of her contractual obligations (which required prepayment) did not retroactively convert the underlying transaction into a credit transaction within the meaning of the Act.

In sum, it is clear that the transaction in issue does not involve the extension of credit. Accordingly, it does not fall within the scope of the Act and, indeed, is plainly not the type of transaction about which Congress was concerned and with which Congress intended to deal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

February 25, 1972.

Respectfully submitted,

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FILE COPY

In the

Supreme Court of the United States

October Term, 1971

No. 71-829

Leila Mourning,

Petitioner,

v.

Family Publications Service, Inc.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-829

LEILA MOURNING,

Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondent, in its opposing brief in No. 71-829, urges that certiorari should be denied because the decision of the Court of Appeals is sustainable on independent grounds not reached by the court below.

Regardless of the existence of other grounds on which the decision below might be affirmed, this Court should grant the writ of certiorari to review the important question reached by the Court of Appeals regarding the validity of the four instalment rule, 12 C.F.R. §226.2(k). Only this Court can resolve the commercial and governmental uncertainty which have been wrought by the decision of the Fifth Circuit. In the event that section 226.2(k) is upheld and that Respondent's other contentions appear substantial, the case can be remanded to the Court of Appeals for

consideration of any remaining issues not appropriately considered by this Court. Compare *N.L.R.B.* v. *Scrivener*, —— U.S. ——, —— (1972).

The independent grounds advanced by Respondent for affirming the judgment of the Court of Appeals are not persuasive.

Respondent contends that the civil liability provision of the Truth in Lending Act is inapplicable because no finance charge was imposed in the instant case. Respondent of course did not disclose any finance charge to Petitioner, but whether there was a finance charge hidden in the total price of the magazines is a question of fact not resolved by either court below. Respondent now concedes that cash customers may have paid less than installment customers (Respondent's Brief, p. 9, note), which is substantial evidence of a hidden finance charge. Compare 15 U.S.C. §1605(a), 12 C.F.R. §226.4(a).

Section 1640(a), 15 U.S.C., on which Respondent relies, does not make imposition of a finance charge a precondition of liability, but merely uses the finance charge to compute the amount of liability under certain circumstances. While the section provides that liability shall generally be "twice the amount of the finance charge in connection with the transaction," it adds "*except* that the liability under this paragraph shall be not less than $100 nor greater than $1,000." (Emphasis added) This latter clause creates an exception to the former, and the $100 minimum is literally as applicable whether the finance charge was one cent or nothing at all. The only federal court reaching this question has held that the actual imposition of a finance charge is not a precondition to liability under section 1640(a). *Ratner* v. *Chemical Bank New York Trust Company*, 329 F. Supp. 270, 280 (S.D.N.Y. 1971).

Respondent further urges that the Truth in Lending Act is inapplicable to the transaction in question because Respondent did not in fact extend credit to Petitioner. The District Court concluded on the basis of the facts before it that Respondent had indeed extended credit to Petitioner, and the Court of Appeals did not reach this question. (Petitioner's Appendix, p. 4a) This Court does not generally undertake on petitions for certiorari to correct errors of fact finding or to review evidence, compare *United States v. Johnston*, 268 U.S. 220, 227 (1926); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949), and should decline Respondent's invitation to do so in this case. The District Court in reaching its conclusion took particular note of evidence that Respondent, in its dunning letters to Petitioner, had stated "*This is a credit account*, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan" (letter of December 4, 1969), and "The contract you signed is: Not subject to cancellation . . ." (letter of December 16, 1969). It would be inappropriate for Respondent to succeed in avoiding a hearing before this Court by urging that these representations which it made to Petitioner when she was without counsel were technically incorrect.

Respondent founds its legal contention that no credit was involved in this case on the fact that Respondent was required to pay for the magazines before they arrived and the allegation, not supported by anything in the record, or ever disclosed to Petitioner, that Respondent did not "generally" pay for the magazines in a lump sum in advance (Respondent's Brief, p. 22). Whatever the significance of these factors in determining the existence of a debt at common law or under the tax code, they have little relevance to the purposes of the Truth in Lending Act. That Act was

passed so that a consumer like Petitioner, in trying to de whether and from whom to purchase magazine sub tions, would know that the contract offered by Respon would cost a total of $122.45. Petitioner's need for t information was the same regardless of whether she Respondent paid for the 60 month subscription in 30, 60 90 months. The Act should be construed accordingly.

Respectfully submitted,

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March 15, 1972

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Federal Reserve Board letter, July 26, 1968, 1 C.C.H. Consumer Credit Guide ¶¶ 30,113, 30,114

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING, PETITIONER,

v.

FAMILY PUBLICATIONS SERVICE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-23a) is reported at 449 F.2d 235. The opinion of the district court (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971. The petition for a writ of certiorari was filed on December 23, 1971, and granted on March 20, 1972 (405 U.S. 987). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether the Federal Reserve Board acted beyond its rulemaking authority under the Truth in Lending Act in promulgating the "four installment rule" of Regulation Z, which provides that any credit transaction payable in more than four installments is subject to the disclosure rules of the Act regardless of whether there is an identified finance charge involved in the transaction.

2. Whether the four installment rule creates a "conclusive presumption" regarding the imposition of finance charges that violates the due process clause of the Fifth Amendment to the Constitution.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution, the relevant provisions of the Truth In Lending Act, 15 U.S.C. 1601–1665, and the pertinent regulations of the Federal Reserve Board, 12 C.F.R. 226, are set forth in an Appendix to this brief, *infra.*

STATEMENT

Under the Truth in Lending Act, 15 U.S.C. 1601-1665, creditors who regularly extend "credit" involving finance charges[1] must disclose "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed," 15 U.S.C. 1631

[1] 15 U.S.C. 1602(f).

(a), information such as the cash price, the amount of the down payment, the total amount to be financed, the amount of the finance charge, and the number and amount of payments required. 15 U.S.C. 1638(a); 12 C.F.R. 226.8. Since creditors could easily evade the Act's requirements by ceasing to identify the finance charge while inflating the "purchase" price,[2] and since the Federal Reserve Board has the duty of prescribing rules and regulations "to prevent circumvention or evasion" of the Act, 15 U.S.C. 1604, the Board's Regulation Z includes within the class of covered creditors any creditor who extends credit in a transaction where repayment, pursuant to an agreement, is or may be made in more than four installments. 12 C.F.R. 226.2(k).

Petitioner Leila Mourning brought this action in the United States District Court under the Act, 15 U.S.C. 1640, alleging that on August 19, 1969, she entered into a written contract with Family Publications Service, Inc. ("FPS") for the purchase of magazines; that in addition to her downpayment of $3.95 the contract obligated her to make thirty monthly payments of $3.95 each in return for a sixty months' subscription to four magazines; and that FPS failed to disclose the total purchase price of the magazines, the unpaid balance and other matters, as required by

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[2] Federal Reserve Board letter, No. 86, August 26, 1969, from J. L. Robertson, Vice-Chairman, Board of Governors, Federal Reserve Board, summarized 1 C.C.H. Consumer Credit Guide ¶ 30,457. See also Federal Reserve Board letter, July 24, 1969, 1 C.C.H. Consumer Credit Guide, ¶¶ 30,113, 30,114; and note 22, *infra*.

Regulation Z, 12 C.F.R. 226.8 and the Act, 15 U.S.C. 1638.

On cross-motions for summary judgment the district court held that FPS had violated the Truth in Lending Act and Regulation Z by extending credit in a transaction involving more than four installment payments without making the required disclosures (Pet. App. 3a–5a). The court found that FPS had extended "consumer credit" within the meaning of the Act, 15 U.S.C. 1602; see 12 C.F.R. 226.2(k): FPS had given petitioner a sixty-month subscription in exchange for a promise to pay a specified sum in thirty monthly installments; the contract provided that it could not be cancelled and that failure to make monthly payments would render the entire balance due; and FPS itself considered the transaction to be a credit transaction (Pet. App. 4a). Pursuant to the Act's civil penalty provision, 15 U.S.C. 1640(a), the court awarded petitioner $100 together with attorney's fees of $1,500 (Pet. App. 5a).[3] The district court did not question the validity of the four installment rule in Regulation Z.

The court of appeals reversed, holding that the Board had exceeded its statutory authority in promulgating the four installment rule (Pet. App. 6a–23a).[4] In the court's view, the Act "requires that a finance charge must be found present, directly or indirectly,"

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[3] The civil penalty in actions brought by consumers is set by the Act at "twice the amount of the finance charge * * * except that the liability * * * shall not be less than $100 nor greater than $1,000." 15 U.S.C. 1640(a)(1).

[4] The court of appeals did not pass on the question whether FPS had extended credit as the district court found.

a transaction before the creditor is subject to the disclosure rules (Pet. App. 19a). But under the Board's four installment rule, disclosure is required "whether or not there is found in such transactions the imposition of a finance charge as an incident to the extension of credit" (*ibid.*). The court therefore held that the Act did not authorize the Board's regulation.

The court of appeals also held that the four installment rule created a "conclusive presumption" that a finance charge had been imposed, that such a conclusive presumption violates the due process clause of the Fifth Amendment, and that Congress itself thus could not have validly enacted the four installment rule. The court accordingly held the Board's rule void (Pet. App. 21a–23a).

INTEREST OF THE UNITED STATES

The court of appeals has invalidated a significant regulation designed to prevent evasion and circumvention by creditors of their obligations under the Truth in Lending Act. The Federal Reserve Board has the duty of promulgating rules and regulations, such as that involved in this case, in order to secure compliance with the Act, 15 U.S.C. 1604, and the Federal Trade Commission has general enforcement responsibilities under that Act,[5] 15 U.S.C. 1607(c).[6] Both agencies believe that the decision below will im-

[5] A violation of the Truth in Lending Act is a violation of the Federal Trade Commission Act, 15 U.S.C. 1607(c).

[6] Other federal agencies have specific enforcement responsibilities in limited areas. 15 U.S.C. 1607(a).

pair public and private enforcement of the Act[7] and will significantly impede full realization of the Act's goal of assuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601.[8]

SUMMARY OF ARGUMENT

I

A.

Under the Truth in Lending Act, creditors who regularly extend credit involving a finance charge must disclose pertinent information to consumers in credit transactions where a finance charge is or may

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[7] Under 15 U.S.C. 1640, consumers may sue creditors for violations of the Act in any court of competent jurisdiction.

[8] On April 27, 1972, the Senate passed the Fair Credit Billing Act, S. 652, in which the four installment rule is included as an amendment to the Truth in Lending Act. The accompanying report, S. Rep. No. 750, 92d Cong., 2d Sess. 18 (1972), explains the provision's purpose as follows:

> This section applies the disclosure provisions of the TILA to creditors who levy no charge but who permit payment in four or more installments. The Board administratively promulgated the more-than-four installment rule to prevent any potential circumvention by creditors who might include a finance charge in their cash price. One court decision held the Board's rule exceeded its authority while another decision affirmed the Board's authority. The amendment thus clarifies the Board's power to issue such a regulation.

S. 652 is currently before the Consumer Affairs Subcommittee of the House Banking and Currency Committee.

is imposed. 15 U.S.C. 1602, 1631. There would be no difficulty in applying this provision to installment sales if creditors always differentiated the cost of credit from the price of the goods. However, some creditors simply pack credit costs into the selling price, thereby hiding the finance charge, which includes all charges incident to the extension of credit in addition to interest. 15 U.S.C. 1605(a).

This practice was often mentioned during the seven years of congressional hearings on the Act. Congress assumed that whenever credit had been extended "free of charge" this simply meant that the creditor had buried the finance charge in the price of the goods. Although Congress did not perceive any way of preventing this practice, it believed that the Act would nevertheless benefit consumers in "no-charge-for-credit" sales since creditors would still have to disclose information other than the finance charge, such as the cash price, the amount of downpayment, the number of payments, and the amount to be financed. This would enable consumers to shop on the basis of price even when they could not shop by comparing finance charges.

B.

It is against this background that the Board promulgated the "four installment rule" in its Regulation Z, which provides that where consumer credit is extended and where, pursuant to an agreement, the purchase price is payable in more than four installments, the creditor is subject to the Act's disclosure requirements.

12 C.F.R. 226.2(k).[9] The Board exercised its rulemaking authority pursuant to Section 1604 of the Act, 15 U.S.C. 1604, after considering the recommendations of a representative advisory board and after receiving hundreds of comments and suggestions from industry and consumer groups and government agencies. Under Section 1604, the Board's regulation is valid if the resulting classifications or adjustments in the class transactions are, in the Board's judgment, necessary or proper to effectuate the purposes of the Act, to prevent evasion or circumvention of the Act, or to facilitate compliance with the Act.

As to the first of these independent grounds for rulemaking, the four installment rule effectuates the purposes of the Act by assuring that consumers will have the benefit of meaningful information from creditors even when finance charges are not identified. This fulfills the Act's goal of providing consumers with full information so they can better decide whether to enter into credit transactions. By making disclosure turn on whether more than four installments are involved, rather than on whether the creditor has in fact differentiated the cost of credit from the price of the goods, the Board's regulation ensures the Act will reach "no-charge-for-credit" vendors, which is consistent with Congress' assumption in this regard.

[9] The regulations define creditors subject to the Act as those who regularly extend "consumer credit," which includes transactions where the purchase price is payable in more than four installments. 12 C.F.R. 226.2(m).

C.

Moreover, the four installment rule is necessary and proper to prevent evasion of the Act. Without it, creditors could easily attempt to circumvent all of their disclosure obligations by hiding the finance charge in the selling price, thereby exempting themselves from coverage. 15 U.S.C. 1602(f), 1631, 1638. And this would mean that the less creditors tell their customers, the easier it would be for them to avoid compliance with provisions designed to give consumers full information.

Even if the four installment rule reaches credit transactions that the provisions of the Act themselves might not cover because there are in fact no finance charges involved directly or indirectly,[10] the Board validly promulgated the rule under Section 1604. When Congress authorized the Board to make adjustments in any class of transactions to prevent evasion, it must have intended to allow the Board to include transactions the provisions of the Act itself might, on their face, not reach.

D.

In addition, the Board's regulation is valid under Section 1604 because it facilitates compliance with the Act. Private civil actions are one of the primary methods of enforcing the Act. But if the actual existence of finance charges had to be shown before no-

[10] Congress, however, assumed that whenever credit is extended the costs necessarily incurred by the creditor are in fact passed on to the consumer despite the absence of an identified finance charge.

charge-for-credit vendors were required to disclose information, there would be endless legal disputes after the fact over bookkeeping practices and other matters foreign to the central purpose of providing the consumer with full information. Yet the Act is designed to relieve consumers of the burden of discovering undisclosed information; and disclosure is to be made before the transaction is consummated.

The four installment rule is intended to meet these problems. It provides consumers and creditors with an easily understandable rule to rely upon in no-charge-for-credit transactions. It ensures uniform application of the Act with respect to such transactions and facilitates compliance.

Since the Board's four installment rule is authorized under Section 1604, it should be upheld. We deal here with remedial legislation and with a regulation that is reasonably related to the purposes of the Act. *Thorpe* v. *Housing Authority,* 393 U.S. 268, 280–281. Furthermore, the regulation in question represents the Board's interpretation of the provisions and purposes of the Act, and that interpretation is entitled to great weight, especially since this is a new statute that the Board must set in motion through regulations. *Udall* v. *Tallman,* 380 U.S. 1, 16. The court below erred in holding that the Board had exceeded its authority.

II.

The court of appeals also erred in holding that the Board's regulation deprives creditors of due process in violation of the Fifth Amendment. The constitutionality of the four installment rule depends not on whether it establishes a "conclusive presumption" regarding the existence of finance charges, as the court below found, but rather on whether there is a rational basis for the regulation and whether it is reasonable in relation to the end sought to be achieved. *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 391; *Ferguson* v. *Skrupa,* 372 U.S. 726, 730-733. Under that standard, the regulation should be sustained. Even if some creditors in fact give "free" credit, the burden of requiring them to disclose is far outweighed by the benefits of the Board's prophylactic rule, which we have discussed above.

Thus, characterizing the Board's regulation as a "conclusive presumption" does not answer the question whether the substantive rule of law it represents is constitutionally valid. This Court, as well as the courts of appeals, have often upheld conclusive presumptions, which are simply a method of classifying. As we have stated above, with respect to economic regulation of business activity, due process requires only that the provisions at issue have a rational basis and be reasonable in view of the policies served. The four installment rule meets that test and the court below erred in holding otherwise.

472-022—72——3

ARGUMENT

I.

THE FOUR INSTALLMENT RULE IS A VALID EXERCISE OF THE FEDERAL RESERVE BOARD'S RULE-MAKING AUTHORITY UNDER THE TRUTH IN LENDING ACT

Aside from constitutional questions, which we discuss separately below, this case turns upon whether the Board, in promulgating the disputed regulation, acted within its authority under 15 U.S.C. 1604, which provides that:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

In our view, the four installment rule is a proper exercise of the Board's Section 1604 rulemaking authority and validly serves not simply one, but all three of the enumerated functions of rulemaking under that provision: it effectuates the purposes of the Act, it prevents evasion of the Act, and it facilitates compliance with the Act. Prior to dealing with these specific points, however, we shall discuss briefly the legislative history of the Act, to put the issues in proper perspective.

A.

[TH]E LEGISLATIVE HISTORY OF THE ACT SUGGESTS THAT CONGRESS [I]NTENDED THAT, EVEN IF SELLERS WERE NOT REQUIRED TO DIS[-]CLOSE FINANCE CHARGES HIDDEN IN THE SELLING PRICE, THEY [N]EVERTHELESS HAD TO COMPLY WITH THE ACT'S OTHER DISCLO[-]SURE REQUIREMENTS

The Act itself requires a "creditor" to disclose pertinent information in a "consumer credit" transaction where a "finance charge" is or may be imposed. 15 U.S.C. 1631. To understand the applicability of this requirement, one must refer to the Act's definitions of the quoted words and phrases. "Creditor" means someone who regularly extends credit "for which the payment of a finance charge is required." 15 U.S.C. 1602(f). "Credit" is the right granted by a creditor to a debtor "to incur debt and defer its payment," 15 U.S.C. 1602(e), and the adjective "consumer" refers to transactions where the debtor is a natural person and the subjects of the transactions are primarily for personal, family, household or agricultural purposes. 15 U.S.C. 1602(h). "Finance charge" is not simply interest, but "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit * * *." 15 U.S.C. 1605(a).

These statutory provisions thus contemplate that the Act's disclosure requirements apply to credit transactions involving finance charges and there would be no difficulty with respect to installment purchases if, in all such transactions, the charges for allowing

the consumer to pay over a period of time were identifiable or if the sum of the payments totalled more than the stated cash price of the goods purchased, which would indicate the presence of a finance charge. But what if the finance charge is buried in the installment price? (That is, the seller does not differentiate the cost of credit from the total selling price.) Of course, if the creditor then gives a "discount" for cash purchases this would be tantamount to charging a higher price for credit sales, or, in other words, a finance charge.[11] But suppose the creditor does not state a cash price or does little or no cash business so that such a comparison is not readily available. Should such creditors be able to escape all of the Act's disclosure requirements by merely refusing to identify finance charges and quoting to their customers only the amount of the monthly payment?

These questions highlight one of the major problem areas considered by Congress in the seven years of hearings on the Truth In Lending Act: the existing practice of burying finance charges in the selling price[12] and the possibility that this practice not only

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[11] See *Hearings on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 1st Sess. 57 (1961) (James Tobin, Member of Council of Economic Advisers: "[W]here the store says to a potential time customer, 'This is my price and there are no credit charges or the credit charges are very low'" and "he is at the same time saying to a potential cash customer, 'My price is really much lower than the one I am quoting for time customers,' then I think he is in violation of the bill.")

[12] Senator Proxmire, one of the co-sponsors of this legislation, estimated that in 1961 more than 50 percent of all retail merchants "concealed" their credit charges in the price of the

would continue but also would become more widespread if legislation required creditors to disclose information such as the cost of credit, the cash price for the goods sold, and the total installment price.[13] During the hearings, everyone assumed that "no charge for credit" simply meant that the creditor had "buried," "concealed" or "packed" finance charges in the price of the goods sold.[14] And there are indications in the hearings that the provisions of the pending legislation might not, in themselves, forbid creditors from doing this.[15]

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goods. *Hearings on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 1st Sess. 389-390 (1961).

[13] See, *e.g.*, *Hearings on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 1st Sess., 49, 57, 127, 389-390, 447-448, 563, 999-1000 (1961); *Hearings on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 2d Sess. 16, 45, [illegible]0-361, 366 (1962); *Hearings on S. 750 before a Subcommittee of the Senate Committee on Banking and Currency*, 88th Cong., 1st & 2d Sess. 500-501, 979 (1963-1964); *Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. [illegible]-678, 513, 699 (1967); *Hearing on H.R. 11601 before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency*, 90th Cong., 1st Sess. 590-591, 596, 802, [illegible]-826 (1967).

[14] See, *e.g.*, note 13 *supra;* the following statement by Senator Proxmire in *Senate Hearings on S. 5*, *supra* note 13, at 513 ("I [illegible], then what you are saying is that at Foyes you don't pay a carrying charge of any kind. Foyes offers free payment accounts without interest. Obviously what Foyes is doing is burying the charge and [sic] [in] the cost of the merchandise."); and *House Hearings on H.R. 11601*, *supra* note 13, at 598 (Rep. Williams: "credit isn't free under any circumstances").

[15] See, *e.g.*, *Senate Hearings on S. 1740*, 87th Cong., 1st Sess., *supra* note 13, at 381 (Senator Proxmire).

However, although a creditor might not be required to disclose finance charges if these were concealed in increased prices, this did not mean the creditor would have no obligation to disclose other relevant information, such as the cash price and the total amount to be financed. Senator Douglas, who had been the principal proponent of the Act, replied as follows to Senator Bennett's claim that it would be impossible to prevent the burying of finance charges:[16]

> Senator DOUGLAS. I would like to call to your attention, Senator, for purposes of the record, that this bill does not provide for judgment solely on the basis of the two, annual interest rate or the total finance charges. It also provides that there shall be a statement of the cash price or delivery price of the property or service to be acquired. Both things are to be stated, price and finance charges, and the judgment of the consumer can be on the basis of both of these factors, not merely on one alone;

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[16] *Senate Hearings on S.* 1740, 87th Cong., 1st Sess., *supra* note 13, at 447-448.

Others made the same point with respect to buried finance charges. See, *e.g., id.*, at 563 (R. C. Morgan, President, Credit Union National Association: "And if there is a separate charge for credit, a price for that charge. *In any event, the customer, the buyer, can find out and tell exactly what the total cost, including the credit, be it concealed or otherwise, is going to be. This I think, is what is good about this legislation.*") (emphasis added); *House Hearings on H.R. 11601, supra* note 13, at 825-826 (Rep. Sullivan: If the merchant conceals the cost of credit by raising the purchase price and the consumer nevertheless buys "at least he knows what he is doing and he is doing it with his eyes open. This is what we are trying to accomplish in this legislation.").

> and if a merchant tries to have a low finance charge and bury it in a high cash price or delivered price, then the purchaser can shop on price just as much as on the finance charges.

In sum, it was generally assumed that whenever a merchant extended credit and purported to impose no finance charges it simply meant that the cost of credit had been absorbed in the price of the goods or services. But this did not relieve the creditor of his duty to disclose; although he might not have to revise his pricing scheme in order to differentiate the cost of credit from the price of the goods, he nevertheless had to tell the consumer the other information set forth in the Act.[17]

B.

THE BOARD'S FOUR INSTALLMENT RULE, WHICH CLARIFIES THE SCOPE OF THE ACT, EFFECTUATES ITS PURPOSE AND IS THEREFORE VALID UNDER SECTION 1604

It is against this background of legislative history and the provisions of this Act that the Federal Reserve Board promulgated the "four installment rule." Under the Board's Regulation Z, a "creditor" subject to the disclosure rules is anyone who regularly ex-

[17] That identifiable finance charges are not the *sine qua non* of the obligation to disclose is further indicated by the fact that the disclosure requirements are specifically applicable to certain types of leases and bailments where the bailee or lessee is given an option to buy—transactions which, by their very nature, do not involve identified finance charges. 15 U.S.C. 1602(g). As with "no-charge-for-credit" installment sales, Congress believed that this was simply another way of deferring payment and that finance charges would therefore be present, although imposed indirectly and not stated.

tends "consumer credit," 12 C.F.R. 226.2(m), and "consumer credit" means the extension of credit where a finance charge is imposed or where, pursuant to an agreement, the purchase price "is or may be payable in more than four installments." 12 C.F.R. 226.2(k). Thus, "no-charge-for-credit" vendors must disclose other pertinent information when payment is made in more than four installments, even if finance charges are not identifiable.

Before so exercising its rulemaking authority, the Board established, pursuant to Section 1609 of the Act, 15 U.S.C. 1609, an advisory board of 20 members, representing "retailer, lender, and consumer groups in all sections of the country." [18] In September 1968, after careful study with the advisory board's assistance, the Board issued a draft of proposed regulations and later received more than 1200 comments and suggestions about the draft from industry and consumer groups, and others, including state and federal agencies.[19] In light of these comments, the Board published and later promulgated Regulation Z with the "four installment rule." [20]

The reasons for the Board's action are clear. The Board knew, as the hearings on the Act had revealed, that vendors could easily evade their disclosure obligations by including finance charges in the price of

[18] *Hearings on Consumer Credit Regulations before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency*, 91st Cong., 1st Sess. 378 (1969) (statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System).

[19] *Id.* at 379.

[20] 34 Fed. Reg. 2002 (1969).

the goods or services. The Board's answer to the problem—the four installment rule—effectuates the "central objective [of the Act] of providing full information to consumers''[21] and clarifies the scope of the Act with respect to "no-charge-for-credit'' practices.[22] The Committee Reports indicate that Congress defined creditors as those who extend credit and require a finance charge, 15 U.S.C. 1602(f), in order to exclude from coverage only deferred-payment sales that are essentially cash transactions. Thus, "the disclosure

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[21] S. Rep. No. 392, 90th Cong., 1st Sess. 2 (1967); see also 15 U.S.C. 1601.

[22] See statement of J. L. Robertson, Vice Chairman of the Board of Governors, Federal Reserve System, *Hearings on Consumer Credit Regulations*, *supra*, note 18, at 380–381:

> Another less troublesome problem involves credit extended "without charge." The act defines creditors as persons who "regularly extend or arrange for the extension of credit for which the payment of a finance charge is required." In many cases creditors claim to make no finance charge, although in every other respect they regularly extend consumer credit. Take, for example, the merchant who advertises watches for a dollar down, and a dollar a week, with no indication of how many dollars are required to pay for the watch. There is little doubt that he is in fact, collecting a finance charge, included but not identifiable in the cash price. And it seems clear that Congress intended to reach advertising of this kind.
>
> Accordingly, the regulation defines "consumer credit" to include credit payable in more than four installments even though no finance charge is expressly imposed. Thus, the advertising and disclosure provisions apply to this type of credit except for those provisions that cannot be complied with because the finance charge cannot be identified. In the example given above, the merchant would have to state the price of the watch and give particulars as to the payment schedule, even though he could not give the amount of the finance charge expressed as an annual percentage rate.

requirement would not apply to transactions which are not commonly thought of as credit transactions, including trade credit, open-account credit, 30-, 60-, or 90-day credit, etc., for which a charge is not made."[33] Beyond this, however, Congress believed that finance charges—identified or not—would be present in longer term installment sales[34] since the costs of money, the costs of collecting overdue amounts, the costs of credit investigations, and so forth would be involved.

Thus, "finance charge" is defined in the Act as "the sum of all charges, payable *directly or indirectly* by the person to whom the credit is extended and imposed *directly or indirectly* by the creditor as an incident to the extension of credit." 15 U.S.C. 1605(a) (emphasis added).[35] And the general disclosure requirements of the Act are for the benefit of "each person to whom consumer credit is extended and upon whom a finance charge *is or may be* imposed," 15 U.S.C. 1631 (emphasis added)—which indicates that it is sufficient that the nature of the transaction renders the presence of such a charge likely.

The Board's four installment rule thus makes clear what is implicit, if not explicit, in the Act itself: that

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[33] S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H.R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967). In light of these comments and since most installment purchases involve monthly payments, the Board limited its rule to credit transactions payable in more than four installments.

[34] See pp. 15–16 *supra*.

[35] See S. Rep. No. 392, 90th Cong., 1st Sess. 8 (1967) (the annual rate of finance charge is "a composite rate which includes all charges incident to credit including interest").

even if they do not identify a finance charge, creditors are still subject to the other disclosure requirements.[38] In the language of Section 1604, it "effectuate[s] the purposes of" the Act by making a reality the Act's promise "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. 1601. It assures all credit customers that they will at least be informed of such important credit information as the cash price, the number and amount of payments, default or delinquency charges, any security interest held by the creditor, and the amount to be financed."[39] 15 U.S.C. 1638.

[38] On the basis of the legislative history, the Board's position is that if the cost of extending credit is not identifiable, the amount of any "finance charge" need not be disclosed. See note [illegible] *supra*. In such situations, a creditor's violation of the other applicable disclosure requirements would make him liable for the minimum statutory penalty of $100. 15 U.S.C. 1640(a)(1).

[39] That Congress knew the importance of informing the consumer of the total installment price is shown by the specific requirement in 15 U.S.C. 1638 that the creditor disclose this. See *Senate Hearings on S. 1740*, 87th Cong., 1st Sess., *supra*, note 18, at 117, which contains the following colloquy:

Mr. BLACK. Another point that should be made here, too, is that when people buy on time, what they frequently will ask is: What is it going to cost me a month?

Senator BENNETT. That is right.

Mr. BLACK. In many instances, I gather they do not bother to add it all up and find out what the total cost would be. Very often, they do, but that is the main concern of people, in many instances: What is it going to cost me a month?

Senator BENNETT. That is right.

Mr. BLACK. When you think about it that way, this monthly charge, sometimes it adds up to more than the

C.

THE BOARD ALSO VALIDLY EXERCISED ITS RULEMAKING AUTHORITY UNDER SECTION 1604 BECAUSE THE FOUR INSTALLMENT RULE IS NECESSARY TO PREVENT EVASION OF THE ACT

The four installment rule is "in the judgment of the Board * * * necessary or proper * * * to prevent circumvention or evasion" of the Act [28]—another, separate basis for the Board's exercise of rulemaking authority under Section 1604. Without the rule, creditors could avoid their obligation to disclose by simply raising their selling price and ostensibly discontinuing charging for credit, thereby exempting themselves from coverage because they do not impose finance charges. See 15 U.S.C. 1602(f), 1631, 1638.[29] This

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buyer can afford. I think, unfortunately, situations arise as a result of that.

See also *House Hearings on H.R. 11601, supra* note 13 at 1176, where Senator Robert F. Kennedy pointed out that "The most shocking cases of overreaching are generally of poor people, who cannot afford a down payment, are attracted by low monthly payments, and are unsophisticated about the total cost they will end up paying."

[28] See note 22 *supra*.

[29] In addition to the disclosure requirements of the Act, Section 1635 grants the consumer a three-day right of rescission when he enters into a credit transaction involving a security interest in his residence. This provision was inserted in the Act partially as a result of overreaching by some home improvement contractors. 114 Cong. Rec. 1611 (1968). Should the more than four installment rule be held invalid, such creditors could, conceivably, bury their finance charges to avoid giving consumers these rescission rights, as well as the Truth in Lending disclosures. Moreover, it could be argued that the prohibitions against "bait" advertising in Section 1662 of the Act would then not be applicable.

would bring about the ironic consequence that the less the creditor tells his customers the more easily he can evade his duty under an Act passed for the purpose of providing consumers with full information.

Although competition from other sellers with lower cash prices might deter this practice in middle class neighborhoods, where a large segment of consumers buy on a cash basis, there would be no such deterrence in poorer areas where the vast majority of consumers buy on credit;[30] indeed, during the hearings Congress heard evidence that this practice already was prevalent.[31] As the court held in *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100, 1103 (N.D. Ill.), the Board's four installment rule is authorized by the Act and is "not only sensible but also necessary to prevent the Truth in Lending Act from becoming a hoax and delusion upon the American public."

Respondent has contended that despite the need to prevent circumvention of the Act, the Board had no authority to promulgate the rule because it covers some transactions that the Act itself might not reach—that is, credit transactions payable in more than four installments where the consumer does not in fact pay a finance charge directly or indirectly. Even assuming that such transactions are theoretically possible, although Congress assumed otherwise as a practical matter,[32] this is not a basis for striking down the rule. As Mr. Justice Holmes stated for the Court in *West-*

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[30] See, *e.g.*, Caplovitz, *The Poor Pay More*, 12–48, 98, 147–150 (1963), and note 27 *supra*.

[31] See note 12 *supra*.

[32] See p. 15 *supra*.

fall v. United States, 274 U.S. 256, 259, "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." See also *North American Co. v. Securities and Exchange Commission*, 327 U.S. 686, 710-711. Congress recognized this in Section 1604, when it authorized the Board to make "adjustments and exceptions for any class of transactions" in order to prevent evasion of the Act. See *Gemsco, Inc. v. Walling*, 324 U.S. 244. This must mean that for credit transactions with no identified finance charges the Board had authority to promulgate a general rule to prevent circumvention even if the rule embraces some transactions that the provisions of the Act might not, on their face, reach.

D.

THE BOARD'S REGULATION ALSO IS VALID BECAUSE IT FACILITATES COMPLIANCE WITH THE ACT—ANOTHER BASIS FOR RULEMAKING UNDER SECTION 1604

The Board also reasonably concluded that the four installment rule was necessary and proper "to facilitate compliance" with the Act—still another independent basis for rulemaking under Section 1604. As the Committee Reports state, one of the main methods of enforcing the Act is through private civil actions.[26] However, if in "no-charge-for-credit" transactions the creditor's duty to disclose turned on whether the consumer could show the actual existence of buried finance

[26] See S. Rep. No. 392, 90th Cong., 1st Sess. 9 (1967) ("The enforcement of the bill would be accomplished largely through the institution of civil actions authorized under section 7 of the bill."); H.R. Rep. No. 1040, 90th Cong., 1st Sess. 19 (1967).

charges as a component of the price of the goods, there would be great difficulties in securing compliance.

Disclosure of all required information is to be made at the outset, when the presence of a finance charge may not be apparent; the creditor is not to await the consumer's discovery of hidden charges before fulfilling his disclosure obligations. The very purpose of the Act is to relieve consumers of the substantial burden of discovering such things so that they will be assured of having sufficient information to decide whether to enter into the credit transaction.

In addition, if each transaction had to be dissected after the fact in order to determine the existence of buried finance charges, there would be endless legal disputes over bookkeeping practices and other matters far-removed from the central purposes of the Act. The Board justifiably rejected any such approach in light of the great difficulties in administration and the lack of uniformity that would be bound to arise, which would not only frustrate the Act's goal of informing consumers, but also would leave creditors without any clear and easily understandable rule to follow in "no-charge-for-credit" transactions.[24]

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[24] Sections 1663 and 1664, 15 U.S.C. 1663, 1664, generally provide that if a specific credit term is advertised, for example, "ten dollars down," the creditor must give additional credit terms in his advertisement to inform fully prospective customers of his credit plan. In the absence of the four installment rule, creditors who extend long term credit that nominally did not involve a finance charge might advertise such specific terms without complying with the more complete advertising requirements applicable to covered creditors. Since the advertisement would not, itself, indicate either to enforcement agencies or to competitors why a particular creditor's advertising did not com-

This case itself illustrates the wisdom of the Board's rule. If FPS had complied with the Act and the regulations thereunder, it would have informed Mrs. Mourning of, among other things, the "cash price" of the magazine subscriptions. See 15 U.S.C. 1638. But FPS did not do this, claiming that the Act did not apply to it because it imposed no finance charges. Yet in its brief in opposition to the petition for a writ of certiorari, at p. 9, note **, FPS admitted for the first time that it gave a discount to cash customers, which is simply another way of saying that persons who buy on time are charged for something more. And that something is at least part of what Congress defined as a finance charge, imposed "indirectly." **

Of course, Mrs. Mourning could not have known of this difference in price for cash and time purchases at the time she signed her contract. And perhaps FPS actually thought it had not imposed any finance charges, although all indications now are that it did. But one of the major reasons for the four installment rule is that creditors, as well as consumers, will clearly know what is required with respect to disclosure

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ply with the Act's requirements, the Board and the Federal Trade Commission foresee substantial administrative problems in policing credit advertising and encouraging voluntary compliance should the rule be invalidated.

** See note 11, *supra*, indicating that giving a discount to cash customers while claiming to time customers that no finance charges are being imposed would be a violation of the Act.

before the transaction is consummated and that compliance with the Act will thereby be facilitated.

In sum, we believe that the Board's action in promulgating the regulation in question is an example of the administrative process working at its best. After thorough study and consideration, the Board dealt with the problem of buried finance charges and the potential for evasion of the Act by setting down a clear and consise rule upon which both consumers and creditors can confidently rely in determining their rights and obligations under that Act. Where, as here, Congress has enacted remedial legislation and conferred broad rulemaking authority upon an expert agency, the agency's regulation should be upheld if it is "reasonably related to the purposes of the enabling legislation"[36] and "within the bounds of [its] administrative powers."[37] And to the extent that the Board's rule represents its interpretation of the provisions and purposes of the Act, this construction is entitled to great weight,[38] particularly since we deal here with a new statute and with rules promulgated by the agency charged with the duty of setting it in

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[36] *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280–281; see *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 308–313.

[37] *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236.

[38] See *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315.

motion.[39] Under these standards, the court below erred in holding that the Board had exceeded its authority.[40]

II.

THE FOUR INSTALLMENT RULE DOES NOT VIOLATE DUE PROCESS

The court of appeals also held that the four installment rule establishes a "conclusive presumption" that

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[39] See *Udall* v. *Tallman*, 380 U.S. 1, 16; *Power Reactor Development Co.* v. *International Electricians*, 367 U.S. 396.

The rule that the contemporaneous construction of a statute by the administering agency is entitled to great weight has a long history. See *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 210: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." The rule is based on the idea that contemporaneous constructions in regulations often reflect the general understanding of law at the time it was enacted by those who took part in the enacting process and thus is evidence of legislative intent. Moreover, the rule allows persons affected by the regulation to rely upon it with the knowledge that the courts will probably uphold the agency's action if, in the future, the regulation is challenged in a lawsuit; thus, certainty and predictability of the law are promoted.

[40] The court below ignored the important remedial aspect of Truth in Lending and instead characterized the Act as penal because there are penal sanctions for willful and knowing violations, 15 U.S.C. 1611. (Pet. App. 17a). For this reason, it interpreted the statute narrowly. However, the penal provisions are not involved in this case, and more important, the Truth in Lending Act and the four installment rule do not involve the problem of lack of notice that dictates narrow construction of penal statutes. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *McBoyle* v. *United States*, 283 U.S. 25, 27 (Mr. Justice Holmes). In any event, when a remedial statute is sought to be enforced in a civil proceeding, it is to be interpreted broadly to effectuate its purpose, not narrowly because it also has criminal sanctions. *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344, 353–355.

all creditors impose finance charges in consumer credit transactions payable, pursuant to an agreement, in more than four installments. After so characterizing the regulation, the court invoked the due process clause of the Fifth Amendment to strike it down (Pet. App. 21a to 23a).

But whether the substantive rule of law embodied in the Board's regulation deprives FPS and other creditors of due process does not depend on labels;[41] the days of *Lochner* v. *New York*, 198 U.S. 45, and *Adkins* v. *Children's Hospital*, 261 U.S. 525, and other similar decisions are long passed.[42] Instead, when economic regulation of business is in question, the standard of review is that stated by this Court in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 391: "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." See also *Ferguson* v. *Skrupa*, 372 U.S. 726, 730–733.

The four installment rule meets that test. There is a rational basis for the classification established by the regulation and the regulation is reasonable in light of the relative benefits and burdens it creates. The Board, as well as Congress, knew that finance charges are

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[41] See Mr. Justice Holmes, joined by Mr. Justice Brandeis and Mr. Justice Stone, dissenting in *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 241; and Mr. Justice Stone, joined by Mr. Justice Brandeis (Mr. Justice Cardozo did not participate in the case), dissenting in *Heiner* v. *Donnan*, 285 U.S. 312, 332, 349 ("Unless the line [the regulation] draws is so wide of the mark as palpably to have no relation to the end sought, it is not for the judicial power to reject it and substitute another, or to say that no line may be drawn.").

[42] See Jackson, *The Struggle for Judicial Supremacy* 197-285 (1941).

typically involved in consumer credit transactions[63] because, when payment is deferred, the seller incurs costs and those costs are passed on to the consumer. Even if some creditors in fact give "free" credit, the burden of disclosure is minimal while the benefits of the Board's prophylactic rule are considerable.

As we discussed above, see pp 22 to 27, without the four installment rule there would be substantial danger that the Act could be easily circumvented or evaded; moreover, transaction-by-transaction determinations regarding the existence of unidentified finance charges would frustrate the purposes of the Act and, in the Board's view, would be unworkable. In short, the important policy considerations underlying the Board's regulations far outweigh whatever inconvenience it may cause creditors. Since the regulation has a rational basis and is reasonable, it satisfies the substantive requirements of due process.[64]

Thus, even if the four installment rule is properly characterized as a "conclusive presumption," it is nevertheless constitutional under the Fifth Amendment. "[T]he creation by law of such presumptions is after all but an illustration of the power to classify." *Jones* v. *Brim*, 165 U.S. 180, 183. See also *Martin* v. *City of Struthers*, 319 U.S. 141, 154 (Frankfurter, J. concurring). And this Court, as well as the courts of appeals, including the Fifth Circuit, have often upheld the validity of "conclusive presumptions." See,

[63] See pp. 115-116, *supra*.

[64] Cf. *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70.

e.g., *Jones* v. *Brim*, 165 U.S. 180; *Hawkins* v. *Bleakly*, 243 U.S 210; *Ferry* v. *Ramsey*, 277 US. 88; *City of New Port Richey* v. *Fidelity & Deposit Co.*, 105 F. 2d 348 (C.A. 5); *United States* v. *Jones*, 176 F. 2d 278 (C.A. 9); *Gratz* v. *Claughton*, 187 F. 2d 46 (C.A. 2); *Jensen* v. *United States*, 326 F. 2d 891 (C.A. 9); *Shanahan* v. *United States*, 447 F. 2d 1082 (C.A. 10).

The *Shanahan* case, *supra*, is particularly apposite. There, the question was whether Section 483 of the Internal Revenue Code (26 U.S.C. 483) violated due process because it created, in effect, a conclusive presumption that when goods are purchased on an installment basis, a portion of the purchase price is interest. The court upheld the statute because it was anchored in the "incontrovertible fact" that "[u]nless clearly intended as a gift, a seller will not sacrifice interest on deferred installment purchase payments" and because it was "a reasonable method of preventing avoidance of ordinary income tax represented by interest payments on installment sales contracts." 447 F. 2d at 1084. Similar factual considerations obtain here.

Schlesinger v. *State of Wisconsin*, 270 U.S. 230, and *Heiner* v. *Donnan*, 285 U.S. 312, relied upon by the court below, are distinguishable. As this Court pointed out in *Helvering* v. *City Bank Farmers Trust*, 296 U.S. 85, and as the Tenth Circuit noted in *Shanahan*, the presumptions involved in *Schlesinger* and *Heiner* were invalidated because, in the Court's view, they created unreasonable classifications. In those cases, the Court saw no rational basis for rules that all gifts

given within two years (*Heiner*) or six years (*Schlesinger*) of the donor's death were made in contemplation of death. Moreover, the tax burden on the individual as a result of the rule could have been considerable. Presumably, the result would have been the same even if the rules had been written without the presumptions, merely requiring that the gifts given within the prescribed period prior to the donor's death must be taxed as part of the donor's estate.[42] However, to the extent that *Heiner* and *Schlesinger* stand for the proposition that "conclusive presumptions" perforce violate the Fifth Amendment, these cases are contrary to *West Coast Hotel, supra,* and the other cases we have cited, pp. 29–31 *supra*, and should be overruled.[43]

In sum, whether the four installment rule is viewed as a conclusive presumption or as simply a substantive rule of law, it is rationally founded pursuant to the Act and is reasonable in light of the important policies it serves. The Fifth Amendment requires no more and the court below erred in holding the regulation unconstitutional.

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[42] *Stanley* v. *Illinois,* No. 70-5014, decided April 3, 1972, in which this Court struck down a state dependency statute conclusively presuming parental unfitness of unwed fathers and depriving them of custody of their children without a hearing, is similarly distinguishable. In that case, the private interest of a man in the children he sired and raised was considerable and the state offered no countervailing governmental interest supporting the statute. Moreover, unlike *Stanley,* which involved essential family relationships, this case deals with regulation of business activity.

[43] See also note 41 *supra.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1972.

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Respectfully submitted.

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MAY 1972.

APPENDIX

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Truth In Lending Act, 15 U.S.C. 1601–1665, provides in relevant part:

> § 1601. Congressional findings and declaration of purpose.
>
> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

§ 1602. *Definitions and rules of construction.*

* * * * *

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

* * * * *

§ 1604. *Rules and regulations.*

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications,

differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

§ 1605. Determination of finance charge.

(a) Definition.

Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system or additional charges.

(2) Service or carrying charge.

(3) Loan fee, finder's fee, or similar charge.

(4) Fee for an investigation or credit report.

(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligator's default or other credit loss.

* * * * *

§ 1631. General requirement of disclosure.

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part to more than one of them.

§ 1638. *Sales not under open end credit plans*

(a) Required disclosures by creditor.

In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

(2) The sum of any amounts credited as downpayment (including any trade-in).

(3) The difference between the amount referred to in paragraph (1) and the amount referred to in paragraph (2).

(4) All other charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid

the disclosure of an annual percentage rate pursuant to this paragraph.

(8) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness.

(9) The default, delinquency, or similar charges payable in the event of late payments.

(10) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates.

(b) Form and timing of disclosure.

Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended, and may be made by disclosing the information in the contract or other evidence of indebtedness to be signed by the purchaser.

(c) Timing of disclosure on mailed or telephoned orders.

If a creditor receives a purchase order by mail or telephone without personal solicitation, and the cash price and the deferred payment price and the terms of financing, including the annual percentage rate, are set forth in the creditor's catalog or other printed material distributed to the public, then the disclosures required under subsection (a) of this section may be made at any time not later than the date the first payment is due.

(d) Timing of disclosure in cases of an addition of a deferred payment price to an existing outstanding balance.

If a consumer credit sale is one of a series of consumer credit sales transactions made pursuant to an agreement providing for the addi-

tion of the deferred payment price of that sale to an existing outstanding balance, and the person to whom the credit is extended has approved in writing both the annual percentage rate or rates and the method of computing the finance charge or charges, and the creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sales price including any finance charges attributable thereto, then the disclosure required under subsection (a) of this section for the particular sale may be made at any time not later than the date the first payment for that sale is due. For the purposes of this subsection, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest price shall be deemed first paid for.

§ 1640. Civil liability.

(a) Failure to disclose.

Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

* * * * *

The regulations of the Federal Reserve Board under the Truth In Lending Act, 12 C.F.R. 226, provide in relevant part:

§ 226.2 Definitions and rules of construction.

* * * * *

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments. "Consumer loan" is one type of "consumer credit."

(l) "Credit" means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

* * * * *

§ 226.8 Credit other than open end—specific disclosures.

(a) *General rule.* Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified.

All of the disclosures shall be made togeth
either

(1) the note or other instrument evidenc
the obligation on the same side of the page
above or adjacent to the place for the
tomer's signature; or

(2) One side of a separate statement which
identifies the transaction.

*　　*　　*　　*　　*

U.S. GOVERNMENT PRINTING OFFICE: 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1971~~ 1972

No. 71-829

LEILA MOURNING,

Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is reported at 449 F.2d 235 and appears in the Appendix ar A. 40. The opinion of the District Court for the Southern District of Florida, which is not reported, appears in the Appendix at A. 32.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 27, 1971 (A.). The petition for certiorari was filed on December 23, 1971, and was granted on March 20, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Reserve Board acted within its statutory authority when it prescribed the four instalment rule, 12 C.F.R. §226.2(k), defining "consumer credit" to include any credit payable in more than four instalments?

2. Whether the four instalment rule, 12 C.F.R. §226.2(k), defining "consumer credit" to include any credit payable in more than four instalments, is constitutional?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

United States Code, Title 15, §1601, 82 Stat. 146 (1968):

§1601. Congressional findings and declaration of purpose:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of comsumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

United States Code, Title 15, §1602(e), 82 Stat. 146 (1968):

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

United States Code, Title 15, §1602(f), 82 Stat. 146 (1968):

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this title shall apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

United States Code, Title 15, §1602(g), 82 Stat. 146 (1968):

(g) The term "credit sale" refers to any sale with respect to which credit is extended or arranged by the seller. The term includes any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.

United States Code, Title 15, §1604, 82 Stat. 148 (1968):

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions,

as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

12 C.F.R. § 226.2(k):

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."

12 C.F.R. § 226.2(*l*):

(l) "Credit" means the right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer its payment, or purchase property or services and defer payment therefor. (See also paragraph (bb) of this section.)

12 C.F.R. § 226.2(m):

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

STATEMENT OF THE CASE

Petitioner is a seventy-three year old widow residing in Dade County, Florida. On August 19, 1969, she entered into a contract with the Family Publications Service, Inc. (hereinafter "FPS"), a Delaware corporation engaged in interstate commerce, for the purchase of certain maga-

sines. The contract was the result of a telephone solicitation made to petitioner followed up by a solicitation at her home. Petitioner made an initial payment of $3.95, and contracted to pay an equal amount for a period of thirty months. FPS agreed that petitioner would receive 4 magazines for a period of sixty months. (A. 6-7)

The contract, made on a standard printed form supplied by FPS, did not disclose to petitioner the total purchase price of the magazines–$122.45. Nor did it disclose the balance due after the initial payment, $118.50, or reveal other information or use terminology required by the Truth in Lending Act, 15 U.S.C. § § 1601 *et seq.* Petitioner was required to state in writing information normally used in a credit check, such as her occupation and business address, and an agent of FPS wrote on the contract "Own 4 years", apparently indicating the period of time which petitioner had owned her home. (A. 7)

The sale of magazine subscriptions under similar circumstances is agreed to be FPS's sole business and source of income. FPS contracts with the magazine publishers to supply magazines directly to its customers. What portion of a subscriber's payments are paid to the publishers and what portion retained by FPS is not disclosed by the record.

Shortly after entering into this contract petitioner, apparently realizing for the first time the large amount of money involved, refused to make further payments. Thereafter petitioner received at least five dunning letters from FPS demanding at first a resumption of monthly payments and then payment of the full $118.50 balance. The letters stressed that petitioner had "a credit account",

warned of the "embarrassment" of having her name appear on a "monthly delinquent report", and threatened "expensive and unpleasant" legal action. (A. 11-24)

On April 23, 1970, petitioner, then represented by the Legal Services Senior Citizens Center, brought this action in the United States District Court for the Southern District of Florida alleging that the contract violated the Truth in Lending Act. Jurisdiction of the District Court was invoked under 15 U.S.C. 1640(e) providing for federal jurisdiction of actions arising under the Act. Petitioner demanded $100 in statutory damages, legal fees, and costs. (A. 2-5) FPS urged, *inter alia*, that it was not required to make any disclosures because the transaction with petitioner did not involve a finance charge and was thus not covered by the Act. Petitioner maintained that she was not required to prove that the $112.45 total cost included a hidden finance charge because the applicable regulation, 15 C.F.R. §226.2(k), required disclosure whenever, as here, the contract was payable in four or more instalments.

In connection with the proceedings in the District Court petitioner filed affidavits of the Director and an Inspector of the Consumer Protection Division of Metropolitan Dade County. The affidavits stated that the Consumer Protection Division had received over 100 complaints about FPS's practices, that to entice potential subscribers FPS falsely represented it was giving away free 5 year subscriptions to "Life" magazine, that those entering into contract with FPS would hot have done so had they known the full contract price, that FPS refused to permit subscribers to cancel contracts and used threatening and harassing tactics to enforce them. The affidavit of the Director further states that on July 29, 1970, defendant and two of its employees were convicted

in Dade County Criminal Court of misleading advertising and that FPS was ordered to cease doing business in the State of Florida. (A. 24-31)

On November 27, 1970, the District Court held that the four instalment rule set out in section 226.2(k) was valid and applicable to the facts of this case, and granted petitioner's motion for summary judgment for $100 statutory damages plus costs and a reasonable attorney's fee. (A. 32-35) On September 27, 1971, the Court of Appeals reversed on the sole ground that the four instalment rule contained in Regulation §226.2(k) was invalid and that FPS was therefore not required to make any disclosures. The Court of Appeals held that the Board lacked the authority to prescribe the four instalment rule, and that the rule was unconstitutional because it was a conclusive presumption.

SUMMARY OF ARGUMENT

I.A. The four instalment rule, 12 C.F.R. §226.2(k), was properly prescribed by the Federal Reserve Board to prevent circumvention and evasion of the law. Although the Truth in Lending Act applies regardless of whether a finance charge was imposed in any particular credit transaction, the specific disclosure provisions are limited to creditors who regularly extend credit and impose a finance charge for it. 15 U.S.C. §1602(f) The four instalment rule requires disclosures whenever a credit transaction involves more than four instalments, regardless of whether the creditor regularly imposes finance charges.

The Board has explicitly found that the four instalment rule is essential to prevent evasion or circumvention

of the law. Without it creditors will raise their prices rather than openly imposing a finance charge, thus burying the cost of the credit in their prices and avoiding coverage by the Act. Consumers would not even be able to readily discover the hiding of such a finance charge because the merchant, as in this case, could refuse to disclose the total purchase price of the goods. The Board's finding that the four instalment rule is necessary to prevent evasion of the law is subject to only limited judicial review, and was not questioned by the court below.

Since the four instalment rule is necessary and proper to prevent evasion, it is within the Board's power. Section 1604, 15 U.S.C., authorizes any regulation or adjustment needed to prevent evasion, and the four instalment rule is clearly within that class. In view of the complexity of credit transactions and the ingenuity of creditors, Congress enacted section 1604 so that the Board could, where proper, go beyond the literal disclosure requirements of the Act. This Court has specifically sanctioned the power of administrative agencies to augment the substantive provisions of statutes they are administering to assure effective enforcement, both when regulations to prevent evasion were specifically authorized by statute, *Gemsco v. Walling*, 324 U.S. 244 (1945), and when they were not. *United States v. Foster*, 233 U.S. 515 (1914).

I.B. The four instalment rule was within the Board's power to prescribe legislative regulations to carry out the purpose of the Truth in Lending Act. The expressly stated purpose of the Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."

15 U.S.C. §1601. Section 1604 explicitly authorized the Board to prescribe regulations to carry out this "purpose." If the Act contained only these provisions the four instalment rule would clearly be a valid application of the legislative rule making authority contained in these sections. 1 *Davis on Administrative Law*, Chapter 5.

This Court has repeatedly recognized that the presence of substantive provisions in a statute does not negate an express grant of legislative rule making authority. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969). In this case the language of section 1604 is clearly not limited to interpretive regulations, and the legislative history of the statute indicates that Congress rejected a narrower wording.

The four instalment rule does not conflict with any specific substantive provision of the Act. The failure of Congress to include the instant transaction within those substantive provisions does not demonstrate any congressional intent to exempt the transaction from disclosures, but only an intent to leave regulation of the transaction to the Board. *American Trucking Association v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 408-410 (1967). The transactions covered by the four instalment rule are not among those expressly *exempted* from the Act by 15 U.S.C. §1603. The rule actually complements the substantive provisions by preventing evasion thereof.

II. The four instalment rule is constitutional. Assuming *arguendo* that the Act is primarily concerned with creditors imposing finance charges, Congress or the Board acting on its behalf could regulate a class of transactions such as those with more than four instalments even though some of the creditors covered might not impose

hidden finance charges. The constitution allows regulation of such classes of transactions even though some individual cases innocuous in themselves are covered. *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

Although this Court has at times criticized conclusive presumptions, it has never expressly invalidated a statute merely because it contained such a presumption. *Heiner v. Donnan*, 285 U.S. 312 (1932). The consensus of modern decisions is that a conclusive presumption merely states a substantive rule of law, and is valid so long as the substantive rule itself is not subject to constitutional attack. *Ellis v. Henderson*, 204 F.2d 173 (5th Cir., 1953). Even if there were a constitutional ban on conclusive presumptions, it would necessarily be restricted to statutes or regulations which establish such a "presumption" in that or other evidentiary terms. *Bowers v. United States*, 226 F.2d 424 (5th Cir., 1955). Since the four instalment rule does not purport on its face to create a presumption or any other type of evidentiary rule, it is valid.

I. THE FEDERAL RESERVE BOARD WAS AUTHORIZED TO PRESCRIBE THE FOUR INSTALMENT RULE

The Truth in Lending Act was enacted in 1968 "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601. The Act requires, *inter alia*, that certain specified disclosures be made by creditors in all consumer credit contracts. 15 U.S.C. §§1631-39. The Federal Reserve Board is directed to prescribe regulations under the Act, and

enforcement is provided for by a variety of administrative agencies and by private litigation. 15 U.S.C. §§1604, 1607, 1640.

The instant action was brought by petitioner as a "private attorney general" to secure enforcement of the law. *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp. 270, 280 (S.D.N.Y., 1971) FPS concedes that it did not disclose to petitioner the total purchase price of the magazines or several other items of information, or use certain specified terminology, required in transactions falling under the Act and regulations.[1] The only issue in this case is whether the contract between petitioner and FPS is the type of transaction in which disclosures are legally required. Since the transaction is not covered by the substantive provisions of the statute but is covered by the regulation known as the four instalment rule, the case ultimately turns on the validity of that regulation.

The statutory disclosure requirements are generally applicable to any extension of "credit" by a "creditor" to a "consumer", each of the quoted terms being defined by the statute and regulation. It is conceded that petitioner is a consumer. The statute defines "credit" and "creditor" as follows:

> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

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[1]Omitted information included the difference between the total price and the down payment. 15 U.S.C. 1638(a)(2) and (3) The terminology required is set out in 12 C.F.R. 226.8 Standardized terminology is required to facilitate consumer comparison of information in comparable form.

> (f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or service, or otherwise. The provisions of this title shall apply to any such creditor, irrespective of his or its status as a natural person or any type of organization. 15 U.S.C. §1602

The regulation defines "consumer credit" and "creditor" in this manner:

> (k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than 4 instalments. "Consumer loan" is one type of "consumer credit."
>
> * * *
>
> (m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit. 12 C.F.R. §226.2

Although the statutory and regulation definitions are generally similar, there is one significant difference on which this case turns. The statute defines "creditors" to those who, *inter alia*, regularly impose a finance charge. If the lender or merchant regularly imposes such charges, he must make the required disclosures in *all* of his credit transactions whether or not they involve a finance charge. Under the regulation this prerequisite of a regular imposition of a finance charge is deleted; instead the disclosure requirements are imposed if in the particular

transaction a finance charge is or may be imposed or the debt is or may be payable in more than four instalments. This latter standard is known as the four instalment rule. The regulation is at once broader and narrower than the statute. The statute covers, but the regulation exempts, a transaction not involving a finance charge or more than four instalments by a creditor who regularly imposes finance charges. Conversely the statutory definitions do not reach, though the regulation does cover, a transaction which does or might involve a finance charge or more than four instalments involving a creditor who does not regularly impose finance charges.

In the instant case FPS concedes that the contract was payable in more than four instalments, but claims that it does not regularly impose finance charges. FPS admits that it may have charged less for subscriptions that were paid for in cash.[2] FPS urges that under these circumstances the Act does not require it to make any disclosures and that it was entitled to refuse to tell petitioner the total cost of the magazines sold. FPS maintains that the four instalment rule, in as much as it purports to require disclosures by creditors who do regularly impose finance charges, is invalid. It is on this latter conteniton that this case turns.

[2]Brief of Respondent in Opposition to Certiorari, p. 9, note.

A. THE FOUR INSTALMENT RULE IS WITHIN THE BOARD'S POWER TO PRESCRIBE REGULATIONS AND MAKE ADJUSTMENTS TO PREVENT CIRCUMVENTION OR EVASION OF THE LAW.

Section 1604, 15 U.S.C., which authorizes the Federal Reserve Board to prescribe regulations, provides:

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The four instalment rule is founded upon an explicit and reiterated finding by the Federal Reserve Board that such a rule is essential to prevent wholesale evasion of the Act. In an opinion letter issued eight days after the regulation became effective, Vice-Chairman Robertson of the Board explained:

> The Board considers this to be a rather significant part of the Regulation, intended as a deterrent to those who might cease to charge a finance charge but, instead, inflate their so-called "cash" price and thus avoid compliance. 4 C.C.H. Consumer Credit Guide, ¶30,434.

Six months later, on December 9, 1969, Governor Robertson wrote:

> We believe that without this general provision [the four instalment rule] the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would be encouraged by Truth in Lending. In order to prevent this ironic

result we felt it imperative to establish the more than four payment rule. 4 C.C.H. Consumer Credit Guide ¶ 30,228.

Again on March 3, 1970, Governor Robertson explained:

> The Board felt that it was imperative to include transactions involving more than four instalments under the Regulation since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth in Lending. Consequently we believe that this is a rather important part of the Regulation. . . . 4 C.C.H. Consumer Credit Guide, ¶ 30,320.

See also Hearings Before the Consumer Subcommittee of the House Banking and Currency Committee, 91st Cong., 1st Sess. Part II, p. 375 (1969).

In upholding the instant regulation under similar circumstances in *Strompolos v. Premium Readers Service*, 326 F. Supp. 1100 (N.D. Ill., 1971), Judge Will concurred in the need for the rule:

> We agree with the Federal Reserve Board's evaluation of the necessity of this type of regulation.
>
> The facts of this particular case may very well demonstrate why the four installment rule is not only sensible but also necessary to prevent the Truth in Lending Act from being a hoax and a delusion upon the American public. Although the defendant contends that it charges the same unitary price for both credit and cash sales, it is readily apparent that a seller in any industry which sells primarily or almost exclusively on a long term credit basis could easily set a theoretical unitary cash and credit price which he knows no one will pay in less than four installments and thus exempt himself and his industry from the coverage of the Act. . . .

> It is most logical that the Federal Reserve Board would . . . plug a loophole by which a substantial portion of long term credit dealers could escape from the Act's coverage. Neither the law, the Federal Reserve Board nor the courts are so simplistic as to believe that a person in the business of extending long term credit should be permitted in effect to abolish the Truth in Lending Act by merely charging a single "cash or credit" price knowing full well that the great bulk of its customers will never pay in less than, for example, thirty months.
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> . . . Were the Board not to have promulgated this rule nor the courts to sustain it, the Truth in Lending Act might never achieve its stated goals. 326 F. Supp. at 1103-04.

Without the four instalment rule there would be little if any incentive to prevent merchants from reverting with avengeance to the practices common prior to the passage of the Act, disclosing neither finance charges, interest rates, nor total prices for their goods. The success of such a scheme of evasion will give merchants selling on credit a substantial and unwarranted competitive edge over banks and other lenders who have no price in which to bury their finance charges. Such results would have a particularly adverse effect on the poor. Burying finance charges and advertising 'free credit' was especially common prior to 1969 in ghetto neighborhoods, and low income consumers are particularly susceptible to these practices because they are least likely to ask the total cost of some good or service so long as the monthly payments seem within their reach. See Comment, "Consumer Legislation and the Poor," 76 Yale L.J. 745, 762-63 (1967).

The difficulty of proving that a creditor who claimed to give free credit regularly hid finance charges in a

substantial number of transactions might well exceed the limited resources of private litigants and administrative agencies. Such an inquiry might well involve an investigation of the creditor's entire business, financial arrangements and bookkeeping procedures over a period of several years. Neither the Act nor the regulation sets out standards for deciding when such finance charges are hidden. A consumer who is not even told the total purchase price has no way of knowing from the unusually high price of the goods that a hidden finance charge may be involved. The consumer's need for information as to the price of the goods and the finance charge, if any, is the same whether or not the credit imposed finance charges in other cases.

In view of these problems, the four instalment rule is clearly within the authority of the Board to prescribe regulations or adjustments necessary or proper to prevent circumvention or evasion of the law. 15 U.S.C. §1604. There is no privision in §1604 limiting the regulations to mere restatements and interpretations of the provisions of the statute. On the contrary, the language of the section evinces a contrary intent.

> The wording of section 105 of the Act [15 U.S.C. §1604] clearly indicates, not only that Congress delegated to the Board authority to issue regulations to effectuate the purposes of the Act, but that Congress also went further and granted the Board the power to promulgate, at its discretion, regulations necessary to prevent circumvention of the Act. The use of the word "circumvention" in the Act signifies that Congress was aware that some creditors who would otherwise fall within the purview of the Act might, after passage of the Act, attempt to restructure their consumer business relations in such a manner that they might technically avoid the wording of the Act.

Along with the recognition of this potential for evasion, Congress also recognized the equally obvious fact that no legislative body could conceivably put into a workable piece of legislation regulations and restrictions covering every imaginable business transaction wherein credit may be involved. Consistent with other complex regulatory legislation, Congress granted an administrative agency the power to apply the basic purposes of the Act to the everyday world. Not only did Congress order the Federal Reserve Board to promulgate regulations to effectuate the purposes of the Act, it also took the further affirmative step of enabling the Board to reach creditors, who in the Board's judgment, were attempting to circumvent or evade the Act by structuring their credit activities to fall a fine line outside the Act. *Strompolos v. Premium Readers Service*, 326 F. Supp. 1100, 1103-04 (N.D. Ill., 1971)

Section 1604's reference to "adjustments and exceptions" clearly contemplates that the lines drawn by the statute itself may be altered, and its scope both restricted by exceptions and extended by adjustments. Nothing in the legislative history of the Truth in Lending Act reveals any Congressional intent to leave the Board powerless to deal with evasion such as that which the four instalment rule was designed to prevent.

This Court has recognized that the authority of an administrative agency to apply and enforce a statute must at times include authority to prescribe regulations going beyond the literal command of the statute in order to prevent evasion. A regulation comparable to the four instalment rule was upheld by this Court under virtually identical circumstances in *Gemesco v. Walling*, 324 U.S. 244 (1945). *Gemesco* arose under the Fair Labor

Standards Act of 1938,[3] which prohibited certain child labor and established minimum wages for various industries. The Administrator of the Wage & Hour Division of the Department of Labor was authorized to issue orders defining the industries and applicable rates and setting such terms and conditions as he found "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." 29 U.S.C. §208. The Administrator issued an order prohibiting industrial homework after finding that such a prohibition was necessary to maintain the wage rates and prevent evasion of the limitations on child labor. 324 U.S. at 249-254 The validity of the regulation was challenged on the ground that the statute itself contained no such requirement. The Court upheld the regulation nonetheless, noting that without it the statute might well be a dead letter in the industry involved:

> The case therefore comes down squarely to whether or not minimum wages may be effectively prescribed and required in this industry. If homework can be prohibited, this is possible. If it cannot, the floor provided by the order cannot be maintained and, what is more important, it inevitably follows that no floor . . .can be maintained.
>
> In this light petitioners' position is, in effect, that the statute cannot be applied to this industry. Their argument is not put in these terms. In comes to that. So to state it is to answer it. The industry is covered by the Act. . . . Congress by stating expressly its primary ends does not deny resort to the means necessary to achieve them. Mention of child labor therefore gives no ground to infer, from failure

[3] 52 Stat. 1060, 29 U.S.C. §§201 *et seq.*

> expressly to mention homework, that the latter was not included within the general language which comprehends all necessary means to achieve the Act's primary ends. 324 U.S. at 254-262.

See also United States v. Foster, 233 U.S. 515 (1914).

In the instant case the Board's authority is even broader than that in *Gemsco*, since here regulations to prevent evasion need not be "necessary" but merely "proper." 15 U.S.C. §1604 Inasmuch as the four instalment rule is both necessary and proper to avoid circumvention of the Act, the Board acted within its statutory authorization is prescribing it.

B. THE FOUR INSTALMENT RULE WAS WITHIN THE BOARD'S POWER TO PRESCRIBE LEGISLATIVE REGULATIONS TO CARRY OUT THE PURPOSE OF THE TRUTH IN LENDING ACT.

Section 102 of the Truth in Lending Act, 15 U.S.C. §1601 sets out succinctly the congressional purpose behind the Act:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.[4]

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[4]The statement of purpose makes no reference to creditors, statutorily defined or otherwise, and thus includes all credit

Section 105 of the Act, 15 U.S.C. §1604, provides that "[t]he Board shall prescribe regulations to carry out the purposes of this title." (Emphasis added.) This grant of authority is at least as far reaching as grants to other agencies which this Court has described as conferring "broad rule-making powers." *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 277, n. 28 (1969).

If the Act contained only these two provisions, the validity of the four instalment rule would be beyond question. The Congress may provide for the establishment of a regulatory scheme by enunciating a general purpose or goal and authorizing an agency to promulgate "legislative rules" aimed at achieving that end. *See generally* 1 *Davis on Administrative Law*, Chapter 5. A regulation so enacted does not constitute an addition to the statute so long as it is within the statutory purpose. *See, e.g., United States v. Foster*, 233 U.S. 515 (1914). Section 1601 provides a sufficiently definite standard for the regulations that the authority of the Board set out in section 1604 does not constitute an invalid delegation of legislative authority. *Compare National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920). To sustain a particular regulation such as the four instalment rule, it is only necessary that it be "reasonably related to the purposes of the enabling legislation under which it was promulgated." *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 280-81 (1969). In the instant case the Board found that, unless disclosures were required in credit transactions involving more than four instalments,

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transactions such as this one regardless of whether the creditor falls within the statutory definition of "creditor" in 15 U.S.C. §1602(f).

the Act's policy of requiring disclosure of credit costs would be frustrated by creditors who buried those charges in their so-called "cash price," and then, as here, refused to disclose even that total price. See pp. 14-16, supra. Even where the credit really is in some sense free, it is useful for consumers to be told that in terms comparable to those used by other creditors to make clear the cost differences, and to be informed clearly and in detail as to the total cost of the goods involved and the repayment conditions so as to avoid over-extending themselves financially. The Board's finding that this regulation will advance the general purposes of the Act is not subject to review absent a clear showing of abuse of discretion. *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943).

The Truth in Lending Act is not, of course, limited to a general statement of purpose and enforcement provisions. The statute also includes several sections establishing substantive rules requiring the disclosure of particular information which must be disclosed in specified consumer credit transactions. 15 U.S.C. §§1631-1639. With regard to these substantive provisions and the ancillary sections dealing with definitions, section 1604 of the Act also confers upon the Board the power to write interpretive regulations. See 1 *Davis on Administrative Law*, §5.03. The fact that the Act contains substantive provisions and authorizes the Board to issue interpretive regulations does not necessarily negate the grant of legislative rule making power to carry out the Act's more broadly phrased statement of purpose. This Court has repeatedly affirmed the authority of federal agencies to promulgate legislative rules pursuant to Acts which, in addition to authorizing such rules, also contained specific substantive provisions.

In *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), this Court upheld the power of the Department of Housing and Urban Development under the Housing Act of 1949 to issue a regulation furthering the Act's general goal of providing "a decent home and a suitable living environment for every American family," 42 U.S.C. §1441, although the Act contained some twenty substantive provisions specifying particular ways of achieving that goal. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), the Court upheld a regulation based on the Commission's authority to issue rules in "the public interest," 47 U.S.C. §§303, 303(r), 307(a), 309(g), 307, 309(h), notwithstanding the many substantive provisions also included in the Federal Communications Act.

Regulatory measures such as the Truth in Lending Act are plainly distinguishable from the tax cases relied on by the Court of Appeals below. *See, e.g., Commissioner of Internal Revenue v. Acker*, 361 U.S. 87 (1959); *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1935). Unlike the instant statute and other regulations which embody a broad statement of purpose which an administrative agency is directed to pursue, the Internal Revenue Code contains no general pronouncement of Congressional intent to tax internal revenue, but only specific revenue measures. And unlike section 1604's command that the Federal Reserve Board prescribe regulations "to carry out the purposes" of the Truth in Lending Act, the Internal Revenue Code authorizes the Secretary more narrowly to prescribe rules and regulations "for the enforcement of this title." 26 U.S.C. §7805(a). It has been understood from the beginning that section 7805 does not authorize the Secretary to issue legislative rules aimed at some

general purpose, but merely to pronounce interpretation of the specific provisions of the tax code. 1 *Davis on Administrative Law*, §5.03, p. 300.

Both the terms of the statute and its legislative history indicate that Congress intended to give the Board broad legislative rule making authority. The terms of §1604 itself clearly indicate that Congress had more than interpretive rules in mind. The Board is directed to prescribe regulations to carry out not merely any particular provision nor generally the Act as a whole; the authorization refers *specifically* to the "purpose" of title. By contrast, the grant of rule making power in *Thorpe* and *Red Lion* was to carry out "the provisions" of the Act. *See* 42 U.S.C. §1408; 47 U.S.C. §303. The statute requires the Board to set up an advisory commission of consumers and creditors, 15 U.S.C. §1609, and contemplates that it will obtain the views of other federal agencies in carrying out its functions. 15 U.S.C. §1608. These provisions for advice and consultation would make little sense if the Board were merely to interpret the Act's substantive provisions, but are readily comprehensible as aids to the Board's broader policy making responsibility to assure a meaningful disclosure of credit terms. Section 1602(g), 15 U.S.C., incorporates by reference into the statute's requirements the regulations issued by the Board under a substantive provision of the Truth in Lending subchapter *or* under the subchapter itself.[5] It cannot be presumed that Congress, having expressly given the Board broad legislative rule making power in section 1604, intended to

[5] "Any reference to any requirement imposed under this sub-chapter or any provision thereof includes reference to the regulations of the Board under this subchapter or the provision thereof in question." 15 U.S.C. §1602(g)

withdraw that power by implication when it enacted the substantive provisions which followed.

The Senate version of the Truth in Lending Act, S. 5, 90th Cong., 1st Sess., 113 Cong. Rec. 18179-18182 (1967), contained a statement of purpose similar to that ultimately enacted.[6] And section 5 of the bill provided broadly "(a) The Board shall prescribe regulations to carry out this Act, . . . (c) Any regulation prescribed hereunder may contain such classifications and differentiations and may provide for such adjustments and exceptions from this Act . . . as in the judgment of the Board are necessary or proper to effectuate the purposes of the Act. . . ." The House version, H.R. 11601, 90th Cong., 1st Sess., 114 Cong. Rec. 1582-86, 1852-1857, was more narrowly case. H.R. 11601 set out in section 203, entitled "Disclosure of Finance Charges; Advertising," detailed disclosure requirements paralleling those in the final bill. Section 204, however, provided "(a) The Board shall prescribe regulations to carry out *section 203* . . . (c) Any regulation prescribed under this section may contain such classifications and differentiations and may provide for such adjustments and exceptions for any class of transactions as in the judgment of the Board are necessary or proper to effectuate the purposes of *section 203* . . ." (Emphasis added.) Section 203 itself contained

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[6]Section 2 of the Senate bill provided:

"The Congress finds and declares that economic stabilization would be enhanced and that competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the costs thereof by consumers. It is the purpose of this Act to assure a full disclosure of such costs with a view to promoting the informed use of consumer credit to the benefit of the national economy."

no statement of purpose. In conference the Senate version of the regulation authorization section was accepted by the conferees, and its language altered to refer specifically to the Act's statement of purpose. Although the Conference Report did not comment on this, it described the Board's power under the Act as "rule making" rather than interpretation. Conference Report No. 1397, 90th Cong., 2d Sess.; 114 Cong. Rec. 14383 (1968). To limit the authority of the Board to interpreting and applying the substantive provisions of the Act would be to subject the Board to the very limitation suggested by the House and ultimately rejected by Congress.

The substantive provisions of the Act, which do not generally preempt Board legislative regulations over and above those statutory requirements, do not preclude the specific provision set out in the four instalment rule. The four instalment rules does not conflict with any specific provision or policy of the Act. *Compare Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 722-725 (1963). The worst that could be said of this regulation is that it applies to a transaction not regulated specifically by the *substantive* provisions of the Act. But this cannot be enough to void a legislative regulation, for it is equally true of *any* legislative regulation pursuant to a statute which also contains substantive provisions. On the contrary, this Court has repeatedly rejected the argument that the absence of a specific statutory provision indicates a Congressional intent to preclude administrative regulation to the same effect. *American Trucking Association v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 408-410 (1967); *United States v. Pennsylvania R.R. Co.*, 323 U.S. 612, 616 (1945). In *United States v.*

Pennsylvania R.R. Co., the Interstate Commerce Commission had directed railroads to interchange their cars with connecting water transportation systems, a requirement admittedly not set out in the Interstate Commerce Act itself. The Court upheld the regulation, explaining:

> There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in [February 4] 1887, 24 Stat. 379, c 104, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. 323 U.S. at 616.

The presumption that the absence of a specific statutory requirement does not reflect a legislative intent to bar such administrative action is buttressed in this case by the language and legislative history of the statute. If creditors not regularly imposing finance charges are not covered by the substantive provisions, that is because of the omission of such creditors from the definition of "creditor" in section 1602. In sharp contrast to this mere omission, section 1603 affirmatively and expressly exempts certain transactions from the entire Act: transactions for business or commercial purposes, transactions in securities or commodities by a registered broker-dealer, transactions other than for real property involving more than $25,000, and transactions under

public utility tariffs.[7] It would clearly be beyond the authority of the Board, for example, to promulgate a legislative rule requiring disclosures in a business loan.[8] Creditors not regularly imposing finance charges are not among those as to whom the Act expressly "does not apply," they are merely omitted from coverage by the substantive provisions. This difference in treatment indicates a different Congressional intent: not to absolutely exempt such creditors, but to have them regulated only to the extent that the Board found proper in the exercise of its legislative rule making responsibilities. The legislative history of the definition of "creditor" reveals no affirmative interest on the part of the Congress in excluding creditors who do not impose finance charges; neither the committee reports nor the summary of the Act on the floor of the Senate

[7] §1603: Exempted transactions

This title does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

[8] Of course the Board could regulate putatively business loans under circumstances where it found a substantial danger that consumer loans would be recast as business loans to evade the Act.

mentioned the omission of creditors not imposing finance charges.[9]

The four instalment rule, rather than frustrating the specific provisions of the Act, complements them. By covering transactions involving more than four instalments, the rule inhibits creditors from evading the disclosure requirements of sections 1637 and 1638 by hiding the finance charge in his prices and then, as here, refusing to reveal those total prices to the consumer. *See* pp. 14-16, *supra*. Section 1602(g) defines credit sale to include a lease or bailment where the cost of the use equals or exceeds the value of the goods or the bailee, or lessee has the option to become the owner of the property for a nominal consideration. The purpose of this section could be frustrated by a creditor who engaged exclusively in such sham lease transactions, since he could not be said, absent special proof, to regularly impose finance charges. Section 1635 gives the consumer three days to rescind credit transactions involving a security interest on his home. This provision was added on the House floor at the instance of Congressman Cahill to protect consumers who were losing their homes when they defaulted on unrelated credit contracts. 114 Cong. Rec. 1611 (1968).[10] This provision, too, could be

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[9]H.R. Report No. 1040, 90th Cong., 1st Sess., (1967), 23-24; S. Rep. No. 392, 90th Cong., 1st Sess., 13 (1967); 113 Cong. Rec. 18403 (90th Cong., 1st Sess., 1967).

[10]Congressman Cahill's discussion of the problem at no point suggested that the creditors involved were openly imposing charges, or that it would matter whether they were.

> "I am sure that most of the Members are aware of the extent to which vicious secondary mortgage schemes have victimized homeowners in the District of Columbia.

rendered nugatory by burying the finance charges in the price of the goods sold. The four instalment rule effectively forestalls such schemes to evade sections 1602(g) and 1635. The use of legislative regulations to prevent evasion of substantive statutory provisions has of course been commended by this Court. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 382-3 (1969).

The extent of judicial review of legislative regulations such as the four instalment rule is limited. Section 1604 charges the Board with the task of devising rules to effectuate the policies of the Act. The relation of regulations to policy is peculiarly a matter of administrative competence. In fashioning regulations to secure the success of those policies, the Board must draw on enlightenment gained from experience. The regulation

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On numerous previous occasions I have pointed out to the Members that New Jersey and Pennsylvania homeowners have similarly been defrauded. The pattern of this unscrupulous fraud is generally not too complex, but finds its success primarily in the anxiety and financial need of homeowners who are ill-prepared to glean the truth from the many representations made to them by mortgage lenders. Generally, the homeowner desiring to borrow money is confronted by deceptive contracts, hidden finance charges, and misrepresentations of the considerations he is to receive and the financial obligations he is to assume.

Frequently, the misrepresentations are made by newspaper advertisements. In other instances, the misrepresentations are made directly to the borrower by the mortgage discount lender or a broker who offers to arrange home improvement repairs or consolidation of all the homeowner's debts into 'one easy monthly payment.'

In all cases, the homeowner is hurried and rushed through the transaction by glib and reassuring talk and in many cases he is never informed nor aware that his home is being made subject to a mortgage." 113 Cong. Rec. 18403.

should not be disturbed unless it can be shown that the four instalment rule is a patent attempt to achieve ends other than a meaningful disclosure of credit terms. *Compare Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). Such a showing is not possible in this case. The Board manifestly interpreted the Act to authorize the instant regulation. That interpretation is entitled to great deference by virtue of the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969), "particularly . . . when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

II. THE FOUR INSTALMENT RULE IS CONSTITUTIONAL

Congress acted constitutionally when it delegated to the Federal Reserve Board the authority to write regulations such as the four instalment rule. The Truth in Lending Act clearly sets out the purpose of the law and the regulations thereunder, 15 U.S.C. §1601, and details the general method by which this purpose is to be achieved. Both the purpose and its method of achievement are specified with sufficient exactness to make clear their meaning and limitations. *United States v. Rock Royal Cooperative*, 307 U.S. 533, 574 (1939). The statute here is substantially more precise than other delegations of authority approved by this Court.

Compare, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Yakus v. United States* 321 U.S. 414 (1944).

The stated purposes of the Act clearly encompass the making of disclosures in all transactions regardless of the status of the creditor. Even if the Act and Board were primarily concerned with creditors who regularly impose finance charges, Congress or the Board could impose disclosure requirements on all transactions involving more than four instalments even though some of the transactions in that class may not involve hidden finance charges. This Court has long held that a regulatory scheme aimed at a particular type of object or transaction may embrace a penumbra which goes beyond such objects or transactions in order to make the regulation effective. In *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), this Court upheld a zoning law which excluded all industry from certain areas, regardless of whether a particular industry might not be offensive or dangerous.

> [T]his is no more than what happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms to include individual cases that may turn out to be innocuous in themselves. Hebe Co. v. Shaw, 248 U.S. 297, 303; Pierce Oil Corp. v. Hope, 248 U.S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. 272 U.S. at 388-89.

See also Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946); *Samuels v. McCurdy*, 267 U.S. 188 (1925);

Hebe v. Shaw, 248 U.S. 297 (1918); *Purity Extract & Tonic Company v. Lynch*, 226 U.S. 192 (1912); *Murphy v. California*, 225 U.S. 621 (1912); *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31 (1908); *Ah Sin v. Wittman*, 198 U.S. 500 (1905); *Booth v. Illinois*, 184 U.S. 425 (1902).

In the instant case the four instalment rule, though it may require disclosures by creditors who do not hide finance charges in their prices, is essential to prevent evasion by creditors who do, and to provide consumers with credit information in a readily comparable form even where the seller maintains that the credit is "free." *See* pp. 00-00 *supra*. The undisputed power of Congress to promote economic stabilization, competition, and the informed use of credit by requiring disclosure of credit terms would be meaningless if Congress could not, by statute or through the Federal Reserve Board, regulate a class of transactions such as that covered by the four instalment rule, in which there was a substantial danger of evasion, merely because some of the creditors involved might not regularly impose finance charges.

The decisions of this Court regarding conclusive presumptions, relied upon by the Court of Appeals below, are inapplicable to the instant case. The leading decision of that line is *Heiner v. Donnan*, 285 U.S. 312 (1932), where the Court ruled unconstitutional a provision that any gift made within two years of the death of the donor would be "deemed and held to have been made in contemplation of death" and thus subject to the federal estate tax. Revenue Act of 1926, § 302(c), 44 Stat. 9, 70. *Heiner* held that the statute involved was a conclusive presumption, and criticized it as a rule of evidence because it denied the taxpayers the right to prove the facts of his case and unreasonably excluded

consideration of every fact tending to show the real motive of the donor. 285 U.S. at 327-329. Assuming *arguendo* that *Heiner* enunciated a general constitutional ban on conclusive presumptions, it is clearly distinguishable from the instant case. *Heiner* and all the other decisions of this Court regarding statutory presumptions have been limited to laws which purport on their face to be rules of evidence.[11] This limitation is

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[11] *See e.g.*, *Turner v. United States*, 396 U.S. 398 (Possession of cocaine "deemed sufficient evidence" to authorize conviction for knowing possession of illegally imported product (1970); *Leary v. United States*, 395 U.S. 6 (Possession of marijuana "deemed sufficient evidence" to authorize conviction for knowing possession of illegally imported product) (1969); *United States v. Romano*, 382 U.S. 136 (Presence in location of illegal working still "deemed sufficient evidence" of carrying on illegal distillery business) (1965); *United States v. Gainey*, 380 U.S. 63 (Presence in location of illegal still "deemed sufficient evidence" of possession of illegal still) (1965); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 215 (Failure to comply with any federal compulsory service law while outside the United States "shall raise the presumption" that departure from the country was to avoid service and training) (1963); *Tot v. United States*, 319 U.S. 463 (Possession of firearm or ammunition by convict "presumptive evidence" of possession of firearm or ammunition which has been transported in interstate commerce) (1943); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (Release of natural gas into air "prima facie evidence" of unreasonable waste of gas) (1931); *Casey v. United States*, 276 U.S. 413 (Possession of opium "prima facie evidence" of purchase in judicial district in which located) (1928); *James-Dickinson Farm Mortg. Co. v. Harry*, 273 U.S. 119 (Fraudulent intent "presumed" if certain promises made in connection with a contract but not kept) (1927); *Yee Hem v. United States*, 268 U.S. 178 (Concealed possession of opium "deemed sufficient evidence" of knowing concealment of opium with knowledge it was illegally imported (1925); *Hawes v. Georgia*, 258 U.S. 1 (Possession of premises on which distillation apparatus found "prima facie evidence" of knowledge of existence thereof) (1962).

essential in the case of conclusive presumptions because any substantive rule of law could otherwise be subject to attack by analyzing that rule as a disguised conclusive presumption. Thus one might urge that the whole of the Truth in Lending Act, requiring disclosures to all consumers, is invalid because, though its purpose is to make consumers aware of the cost of credit, it conclusively presumes that all consumers lack that information and does not allow a creditor to prove that a particular consumer knew the cost of his credit from some other source. No substantive rule of law would be safe from such a destructive analysis, and a prohibition against conclusive presumptions construed in this manner would be absolutely inconsistent with the well established penumbra cases. *Supra*, pp. 32-33.

This Court has not only limited the application of its rules regarding presumptions to explicitly evidentiary statutes, but when invalidating a presumption has repeatedly suggested that Congress would have achieved the same effect by enacting a substantive rule instead. *See e.g., Leary v. United States*, 395 U.S. 6, 54 (1969); *Turner v. United States*, 396 U.S. 398, 430 (opinion of Justice Douglas) (1970).

This limitation on *Heiner* is plainly applicable to the instant case. Regulation §226.2(k) does not state that the extension of credit involving more than four instalments shall create a "presumption," or be treated as "evidence," that the creditor regularly hides or imposes finance charges. On the contrary, the regulation purports to do no more than define the phrase "consumer credit." The Board's official explanation of this regulation speaks of the danger of evasion not of evidentiary concerns. This Court's self-imposed obligation to interpret laws and regulations whenever possible to uphold their

constitutionality requires that the instant regulation be construed as substantive rather than evidentiary. *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U.S. 1, 30 (1937). Under the circumstances it would be entirely inappropriate for the Court to treat the regulation as an evidentiary rather than a substantive rule.[12]

Even if this regulation did involve a conclusive presumption, it would still be valid. The Court of Appeals below erred in interpreting the decisions of this Court to announce an absolute ban on conclusive presumptions. On the contrary, although this Court was critical of such presumptions some forty years ago, it never went so far as to invalidate a statute on the sole ground that it was a conclusive presumption. Subsequently this and lower courts have moved away from such criticism, and have tended to treat such presumptions as merely creating substantive rules of law.

The early decisions of this Court dealing with conclusive presumptions involved presumptions which had the effect of creating substantive rules of law which themselves were invalid. *See e.g., Marx v. Hawthorn*, 148 U.S. 172 (1893) (conclusive presumption barring proof that due process requirement of notice had not been met); *Bailey v. Alabama*, 219 U.S. 219 (1911) (presumption and other evidentiary rules had effect of making it a crime for a worker to breach a labor contract for which he had received advance payment, thus

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[12] *Compare Bowers v. United States*, 226 F.2d 424 (5th Cir., 1955), upholding a provision of the Agricultural Adjustment Act which stated that all produce not accounted for would be "deemed" marketed as a substantive rule rather than a conclusive presumption.

reintroducing peonage in violation of the Thirteenth Amendment). Later cases approving rebuttable presumptions contrasted them with conclusive presumptions, indicating by way of dicta that the latter variety were disfavored because they precluded a party from offering proof as to some important issue. *Mobile, Jackson, & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Luria v. United States*, 231 U.S. 9, 26 (1913); *Manley v. Georgia*, 279 U.S. 1, 6 (1929). In *Schlesinger v. Wisconsin* this Court invalidated a state tax provision similar to that in *Heiner*, which provided that all gifts within six years of a taxpayer's death were to be treated as made in contemplation thereof. 270 U.S. 230 (1926). The taxpayer, citing *Mobile* and *Bailey*, invited the Court to invalidate the statute because it was a conclusive presumption. 70 L. Ed. 561. The Court declined the invitation, and invalidated the law on the ground that taxing all gifts within six years of death and exempting all others was "wholly arbitrary." 270 U.S. at 240. Justices Holmes, Brandeis and Stone dissented, urging that the penumbra cases should have been applied. 270 U.S. at 241.

In *Heiner v. Donnan*, 385 U.S. 312 (1932), the decision seems to have been based in large measure on the allegedly arbitrary line between gifts more and less than two years from death, relying on *Schlesinger*, and on the fact that heirs were required to pay out of the estate taxes on prior gifts over which they had no control, relying on an earlier decision in *Hoeper v. Tax Commission*, 284 U.S. 206 (1931). The Court also criticized the effect of a conclusive presumption, but stopped short of enunciating a general constitutional ban

against them.[13] To the government's argument that the tax code merely enunciated a substantive rule of law, the court responded that the statute was really a conclusive presumption because it had once been a rebuttable one, and because it was aimed at legislating facts into existence. 285 U.S. at 329.

Heiner, which itself fell short of stating a general ban on conclusive presumptions, marked the high water mark in the Court's opposition to such laws. Two years later in *United States v. Provident Trust Company*, 291 U.S. 272 (1934), the Court indicated that conclusive presumptions were aceptable at least where there were "grounds or policy so compelling in character as to override the generally fundamental requirement of our system that questions of fact must be resolved according to proof," 291 U.S. at 282, a concession to practical necessity which had been explicitly rejected in *Schlesinger* and *Heiner* and which would clearly cover the instant case. Abandoning the position in *Heiner* that irrebutable presumptions were

[13] "The presumption here excludes consideration of every fact and circumstance tending to show the real motive of the donor.The young man in abounding health, bereft of life by a stroke of lightning within two years after making a gift, is conclusively presumed to have acted under the inducement of the thought of death, equally with the old and ailing who already stand in the shadow of the inevitable end. And although the tax explicitly is based upon the circumstance that the thought of death must be the impelling cause of the transfer (United States v. Wells, supra (283 U.S. p. 113)) (the presumption, nevertheless, precludes the ascertainment of the truth in respect of that requisite upon which the liability is made to rest, with the result, in the present case and in many others, of putting upon an estate the burden of a tax measured in part by the value of property never owned by the estate or in the remotest degree connected with the death which brought it into existence. 285 U.S. at 327-28."

to be treated as presumptions rather than substantive rules of law, the Court declined to reach the question of whether such presumptions were "in a more accurate sense" rules of substantive law, noting Professor Wigmore's position in support of that analysis.[14]

Two years thereafter, in *Binney v. Long*, 299 U.S. 280 (1936), the Court explained *Schlesinger* as a case involving an arbitrary distinction among *inter vivos* transactions, and made no reference to any problem of irrebutable presumptions therein. 229 U.S. at 291. In *Oyama v. California*, 332 U.S. 633 (1948), Justices Reed and Burton noted that a conclusive presumption "*might*" be open to serious attack. 332 U.S. at 378, n. 4 (dissenting opinion). Since *Oyama* Circuit Courts in the Fifth, Seventh, Ninth and Tenth Circuits, as well as three district courts have concluded that conclusive presumptions are, and should be treated as, substantive rules of law.[15] The refusal of lower courts in recent years

[14] "*Conclusive Presumptions.* In strictness, there cannot be such a thing as a "conclusive presumption." Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence." 9 *Wigmore on Evidence*, §2492 (3d ed.)

[15] *Capital National Bank of Tampa v. Hutchinson*, 435 F.2d 46, 52 (5th Cir., 1970); *Jensen v. United States*, 326 F.2d 891, 895 (9th Cir. 1964); *United States v. 2600 State Drugs*, 235 F.2d 913, 917 (7th Cir. 1956), *cert. den.*, 352 U.S. 841; *Ellis v. Henderson*, 204 F.2d 173, 175 (5th Cir. 1953); *United States v. Jones*, 176 F.2d 278, 288 (9th Cir. 1949); *Shanahan v. United States*, 315 F. Supp. 3 (D. Colo., 1970), *aff'd* 447 F.2d 1082; *United States v.*

to invalidate presumptions merely because they are conclusive is succinctly explained in *Ellis v. Henderson*, 204 F.2d 173, 175 (5th Cir., 1953). "[W]hat is termed a 'conclusive presumption' as a rule of evidence without logical basis might be constitutionally invalid, but if the rule of substantive law would be constitutional, the form of words used in stating the rule is immaterial."

As Professor Wigmore has suggested, the fatal defect in the early criticisms of conclusive presumptions was the insistence on regarding them as evidentiary rather than substantive rules. To say, for example, that action A is to be regulated and that action B is conclusive evidence of A, is the same thing as regulating B as well as A. It was precisely this equivalency which underlay the criticism of presumptions in *Marx* and *Bailey*, for there the equivalent substantive rule was constitutionally unacceptable. Where the presumption is equivalent to a *valid* substantive rule, it is difficult to see why Congress' choice of words should render unconstitutional a rule constitutional in its effect.[16] These criticisms of conclusive presumptions and the penumbra cases noted earlier are fundamentally inconsistent, and the latter must prevail. To claim that some B transactions may be "innocent" in that they do not involve A's is merely to describe the situation which

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Hutchins, 47 F.R.D. 340, 341 (D. Ore., 1969); *United States v. Davio*, 136 F. Supp. 423, 429 (E.D. Mich., 1955). Conclusive presumptions are treated as substantive under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1968), although at least some rebuttable presumptions are procedural. *Maryland Casualty Company v. Williams*, 377 F.2d 389, 394 (5th Cir. 1967) 5 *Moore's Federal Practice* ¶43.08.

[16] *Compare Heiner*, in which "deem" was described as creating an evidentiary rule, with *Bowers, supra*, note 12, in which the same term was held to create a substantive rule.

the penumbra cases tell us may be regulated without regard to this overbreadth. It cannot be seriously argued that this Court would have reached a different result in *Euclid*, for example, if instead of a literal ban on all industry in certain areas the law had achieved the same thing by prohibiting noxious industry and "deeming" all industry noxious. More is required to invalidate a Congressional or state enactment than a mere inartful choice of terminology.

The criticism of conclusive presumptions in *Heiner* and *Mobile* arose at a time when the financial interests of businessmen and taxpayers were regarded by the court as constitutionally sacrosanct as First Amendment activities. Since that period of economic royalism the Court has properly distinguished between constitutionally protected activities and ordinary commerce. As Justice Stewart wrote in *Shelton v. Tucker*, citing the dissenting opinion in *Schlesinger v. Wisconsin* and one of the penumbra cases,[17] while the Court has remained solicitous of fundamental personal liberty "[i]n other areas involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional purpose." 364 U.S. 479, 489 (1960). The instant regulation is clearly within that realm of permissible administrative leeway and should be upheld.

[17] *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192 (1912)

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed and defendant directed to pay plaintiff statutory damages in the amount of one hundred dollars plus the costs of this action together with a reasonable attorney's fee as required by 15 U.S.C. §1640(a)(2).

Respectfully submitted,

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June 19, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING,
Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (App. 32-35) is reported at 4 CCH CONSUMER CREDIT GUIDE ¶ 99,632 (1970) (Mehrtens, J.). The opinion of the United States Court of Appeals for the Fifth Circuit (App. 40-54), reversing the decision of the District Court, is reported at 449 F. 2d 235 (1971).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971 (App. 54). The petition for a writ of

certiorari was filed on December 23, 1971, and granted on March 20, 1972 (App. 55); 405 U. S. 987. The jurisdiction of the Court is invoked under 28 U. S. C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute to be construed is the Truth in Lending Act, 15 U. S. C. §§ 1601-65 (1970). The regulation in issue is to be found in Regulation Z, 12 C. F. R. §§ 226.1-.13 (1972), promulgated by the Federal Reserve Board. The relevant provisions of the Act and of Regulation Z are set forth in an Appendix to this brief, *infra.*

QUESTIONS PRESENTED

The Truth in Lending Act provides that "creditors" who regularly extend credit "for which the payment of a finance charge is required" (15 U. S. C. § 1602(f)) shall disclose the amount of the finance charge and other specified information in transactions which entail a finance charge (15 U. S. C. § 1631(a)). For failure to make the statutory disclosures, the Act imposes civil penalties (15 U. S. C. § 1640(a)) upon creditors in an amount equal to "twice the amount of the finance charge in connection with the transaction, except . . . [not] less than $100 nor greater than $1,000. . . ." The four installment rule of Regulation Z promulgated by the Federal Reserve Board provides that the required disclosures must be made in credit transactions involving repayment in more than four installments, regardless of whether a finance charge is entailed (12 C. F. R. §§ 226.2(k), (m) and (bb), 226.8(a)).

The questions presented by this case are:

1. Whether the court below erred in holding that the Federal Reserve Board acted in excess of its authority under the Truth in Lending Act in promulgating the four installment rule of Regulation Z.

2. Whether a civil penalty may be imposed under 15 U. S. C. § 1640(a) in connection with a transaction that does not involve a finance charge.

3. Whether transactions in which consumers prepay for goods involve an extension of credit within the meaning of the Truth in Lending Act.

STATEMENT OF THE CASE

Respondent, Family Publications Service, Inc. ("FPS"), was engaged in the business of offering subscriptions to a large number of magazines on what is commonly known as a paid-during-service ("P-D-S") basis.* As is common under P-D-S plans, FPS's standard form of contract provided for the delivery of the magazines selected by the customer over 48 (or 60) months, for which the customer paid on a monthly basis over the first 24 (or 30) months.** Under this plan, at every point in time prior to the end of the contract period, the customer has paid for more issues than he has received so that the payments are in fact prepayments by the customer for magazines to be delivered to the customer in the future (App. 41).

Under the terms of the FPS contract executed by petitioner on August 19, 1969, she was to receive *Ladies Home Journal*, *Holiday*, *Life*, and *Travel and Camera* for 60 months in return for an initial payment of $3.95 and 30 monthly payments of $3.95 (App. 41). Although she received the magazines ordered, petitioner defaulted on her contract and never made any payments beyond the initial

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*The court of appeals also held the Board's four installment rule the date of its incorporation in 1958 until it terminated selling operations in February 1971.

**In a relatively small number of cases FPS's customers elected to pay the full purchase price at the outset rather than over 24 (or 30) months. Subsequent to the proceedings below we have discovered that, contrary to representations made below, a small number of those customers (representing a small fraction of 1% of FPS's total customers) may have been charged less than the aggregate purchase price under FPS's standard form of contract.

$3.95 payment. Consequently, her contract was cancelled by FPS on April 15, 1970 (App. 41-42).

Petitioner Mourning commenced this action in the United States District Court for the Southern District of Florida on April 23, 1970, on her own behalf and on behalf of a class comprised of all residents of Dade County, Florida, who had entered into contracts with FPS since July 1, 1969 (the effective date of the Truth in Lending Act). The second amended complaint ("the complaint") alleged that the FPS standard form contract did not contain the disclosure of credit terms required by the Truth in Lending Act and the Regulations promulgated thereunder by the Federal Reserve Board ("the Board"). The complaint prayed for a civil penalty of not less than $100 nor more than $1,000 on behalf of each member of the class, together with attorneys' fees and the cost of the action, as provided for in 15 U. S. C. § 1640(a) (App. 2-5).

The Act provides that creditors who regularly extend consumer credit "for which the payment of a finance charge is required" (15 U. S. C. § 1602(f)) shall make specified disclosures (15 U. S. C. § 1631(a)), including the amount of the finance charge and the finance charge expressed as an annual percentage rate (15 U. S. C. § 1638(a)(6)-(7)). Regulation Z promulgated by the Board provides that such disclosures must be made in credit transactions involving repayment in more than four installments, regardless of whether a finance charge is involved (12 C. F. R. §§ 226.2(k), (m) and (bb), 226.8(a)). For failure to make the required disclosures, the Act imposes both criminal (15 U. S. C. § 1611) and civil penalties (15 U. S. C. § 1640(a)), as well as administrative sanctions under the Federal Trade Commission Act (15 U. S. C. § 1607(c)). The civil penalty section of the Act under which petitioner's claim arises, provides that

> "any creditor who fails in connection with any consumer credit transaction to disclose to any person

any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000 . . . ." 15 U. S. C. § 1640(a).

On August 28, 1970, both parties moved for summary judgment. Petitioner contended that her transaction with FPS was subject to the Act solely by virtue of Regulation Z because it was a credit transaction payable in more than four installments and that she was entitled to recover a civil penalty regardless of whether the transaction entailed a finance charge. Petitioner asserted that the absence of a finance charge was irrelevant—since none was required under the four installment rule. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 5.) FPS contended that the transaction was not subject to the disclosure and penalty provisions of the Act because, *inter alia*, (1) it was not a credit transaction, (2) the disclosure and penalty provisions of the Act do not apply in the absence of a finance charge, and (3) the Regulations could not properly extend the scope of the Act. Both parties concurred in the view that there were no material issues of fact and that the question to be decided was the proper reach of the disclosure and penalty provisions of the Act and the Regulations.

On November 27, 1970, the district court rendered its final decision (1) dismissing the class action allegations in the amended complaint, (2) denying FPS's motion for summary judgment, and (3) granting judgment in favor of petitioner in the amount of $100, together with $1,500

attorney's fee and costs. The court held that "the transaction here in question falls squarely within the scope of the Act and its Regulations *by virtue of the 'more than four installments' rule,* 12 C. F. R. § 226.2(k). . . ." (App. 34) (emphasis added).

On December 11, 1970, FPS filed its notice of appeal from the district court's order and from the judgment entered thereon in so far as the order granted plaintiff's motion for summary judgment and denied FPS's motion for summary judgment.

On September 27, 1971, the court of appeals held the four installment rule invalid and reversed and remanded with directions that the complaint be dismissed. The court found that under the Act "three essential elements must be found present together in a transaction" before the duty to make the specified disclosures arises: (i) a creditor (ii) who extends consumer credit (iii) in a transaction which entails a finance charge (App. 49). The court also found, in accord with the position taken by the United States as amicus curiae, that under the regulation promulgated by the Federal Reserve Board

> "in order for the disclosure and penalty provisions of the Truth-in-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required." (App. 50.)

The court concluded that "an inconsistency exists between the four installment rule and the Truth-in-Lending Act" (App. 50) and that, in promulgating the rule, the Board had "over-stepped the authority granted to them

under 15 U. S. C. § 1604." (App. 51.) Relying on this Court's decisions in *Commissioner* v. *Acker*, 361 U. S. 87 (1959), and similar cases, the court of appeals held that the Board's rule constituted an invalid "administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment." (App. 51.)*

Having found the Act inapplicable to the transaction in issue by reason of the invalidity of the four installment rule, the court of appeals did not find it necessary to consider FPS's further contentions (1) that the civil penalty provision of the Act, providing for a penalty equal to "twice the amount of the finance charge" imposed, is inapplicable where the transaction in question does not involve a finance charge, and (2) that the Act is inapplicable because FPS did not extend consumer credit but rather was prepaid by its customers.

SUMMARY OF ARGUMENT

I.

The court of appeals correctly held that the four installment rule of Regulation Z, 12 C. F. R. § 226.2(k), is an invalid attempt by the Federal Reserve Board to bring within the ambit of the Truth in Lending Act, 15 U. S. C. §§ 1601-65 (1970), transactions which Congress has explicitly put beyond the scope of the Act. The Act imposes

*The court of appeals also held the Board's four installment rule invalid as constituting a conclusive presumption violative of the due process clause of the Fifth Amendment. We do not believe that it is necessary to reach this constitutional ground and we do not rely on it. We concur in the view expressed by petitioner that Congress could have enacted the four installment rule without violating the due process clause. A bill intended to accomplish that result was passed by the Senate on April 27, 1972, and is currently before the Consumer Affairs Subcommittee of the House Banking and Currency Committee, S. 652, 92nd Cong., 2nd Sess.

certain requirements of disclosure upon creditors. The term "creditor" is defined to include "*only* [those] creditors who regularly extend . . . credit for which the payment of a finance charge is required . . . ." 15 U. S. C. § 1602(f) (emphasis added). Such creditors are required to disclose specified information relating to the cost of credit "to each person . . . upon whom a finance charge is or may be imposed . . . ." 15 U. S. C. § 1631(a). Finally, under Section 1640(a) such creditors are liable for a civil penalty in an amount equal to "twice the amount of the finance charge in connection with the transaction, except . . . [not] less than $100 nor greater than $1,000 . . . ." 15 U. S. C. § 1640(a).

Notwithstanding the congressional decision to require the statutory disclosures only in connection with credit transactions involving a finance charge, Regulation Z purports to require such disclosures in connection with credit transactions repayable in four or more installments regardless of whether a finance charge is imposed. Petitioner's claim against FPS is based solely on the four installment rule and petitioner concedes that the transaction in issue is not subject to the substantive provisions of the Act which require the presence of a finance charge. The four installment rule is invalid because it is in conflict with the intention of Congress as manifested by the language of the Act and the legislative history. The congressional committee reports make it particularly clear that Congress intended that the disclosure requirements of the Act be limited to transactions involving finance charges. A bill pending before Congress was amended expressly for the purpose of making clear that the disclosure requirements would not apply to transactions in which a finance charge is not involved.

Although petitioner and the Government argue that the four installment rule is necessary to effectuate the purpose of the Act and prevent circumvention of the Act, in fact it does neither. In particular, it does not solve the problem

presented by the buried or hard-to-find finance charge. The Government's thesis that creditors subject to the Act may satisfy their statutory obligations merely by disclosing total price without separately identifying the cost of credit is without warrant in either the Act or the Regulation and is subversive of the statutory purpose.

The conclusion reached by the court of appeals that the Board, in promulgating the four installment rule, "overstopped the authority granted to them under 15 U. S. C. § 1604" (App. 51) is clearly supported by the decisions of this Court. *See, e.g., Federal Communications Commission* v. *American Broadcasting Co., Inc.,* 347 U. S. 284 (1954); *Commissioner* v. *Acker,* 361 U. S. 87 (1959); *Miller* v. *United States,* 294 U. S. 435 (1935).

II.

The judgment of the court of appeals is sustained on two independent considerations that were advanced by FPS below but which the court of appeals did not find it necessary to reach. *See Langnes* v. *Green,* 282 U. S. 531 (1931).

First, whether or not the disclosure requirements and the administrative enforcement provisions of the Act are applicable in the absence of a finance charge, the civil liability provision, under which petitioner's claim arises, is inapplicable. That provision (15 U. S. C. § 1640(a)) specifies that recovery of an amount equal to "twice the amount of the finance charge in connection with the transaction, except that the liability . . . shall not be less than $100 nor greater than $1,000 . . . ." The finance charge provides the initial measure of the award. The legislative history supports the view that the minimum and maximum dollar amounts cannot reasonably be construed as providing an alternative means of determining the amount of an award in the absence of a finance charge because the

language of Section 1640(a) is not susceptible of an "either/or" interpretation. Indeed, Congress rejected a bill which provided for liability in the alternative.

Second, the disclosure and civil penalty provisions of the Truth in Lending Act apply only to credit transactions. The Act is inapplicable to the transaction in question for the fundamental reason that the transaction did not involve the extension of credit by FPS to petitioner. It is the essence of a credit transaction that one party parts with value in reliance on the promise of another to pay at a later date. Under the standard FPS contract, however, FPS does not deliver anything in advance of payment. Quite the contrary, the customer pays in advance for the subsequent receipt of magazines. Nor does the fact that the customer contracts to make periodic payments turn his obligation into a credit obligation. "A transaction may be an instalment contract without being a credit transaction at all." 3A A. CORBIN, CONTRACTS § 687 (1960). The Board has formally recognized that an agreement to pay in installments for goods or services to be rendered in installments does not involve an extension of credit within the meaning of the Act unless the payments lag behind delivery of the goods or services. FRB Opinion Letter No. 262 (1970).

The Act adopts the common understanding of a credit transaction; and defines the term "credit" as "the right granted by a creditor to a debtor . . . to incur debt and defer its payment." 15 U. S. C. § 1602(e). A debt results from an unconditional agreement to pay and is to be distinguished from the obligations of a contract under which the performance of both parties lies in the future. Here, there is clearly no "debt" within the meaning of the Act. Petitioner's obligation to pay was contingent on performance by FPS.

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY HELD THAT THE FOUR INSTALLMENT RULE IS INVALID.

Petitioner and the Government urge that the Fifth Circuit erred in holding invalid the four installment rule of Regulation Z, 12 C. F. R. § 226.2(k). The court of appeals held the rule invalid because it purported to bring transactions which do not entail a finance charge within the disclosure and penalty provisions of the Act, whereas the Act explicitly excludes such transactions from its coverage.

The court of appeals was clearly correct in concluding that the four installment rule is inconsistent with the Act and is therefore invalid. As is set forth below, three key sections in the Act (15 U. S. C. §§ 1602(f), 1631(a) and 1640(a)) as well as the legislative history of the Act make plain that the Act applies only to transactions that entail a finance charge. On the other hand, the four installment rule dispenses with that prerequisite by providing that transactions involving payment in more than four installments are subject to the Act's disclosure and penalty provisions whether or not they entail a finance charge.

There is no dispute that the Regulation eliminates the finance charge requirement imposed by the Act. Petitioner concedes that " the transaction [in issue] is not covered by the substantive provisions of the statute" and that, in the absence of the Regulation, FPS would not be subject to the disclosure requirements of the Act. Pet. Br. 11. What is in dispute is the validity of the Regulation.

Further, contrary to the impression created by the briefs of petitioner and amici, we are not concerned here with whether transactions involving hidden or buried finance charges are subject to the requirements of the Act. It is not disputed that such transactions are subject to the Act with-

out assistance from the Regulations. Indeed, the fundamental purpose of the Truth in Lending Act was to require disclosure of concealed finance charges. The question presented here is whether transactions which the Act does not reach because they do not entail finance charges may nonetheless be brought within the Act's ambit by the Regulations.

A. The rule is inconsistent with the Act.

1. The statutory language.

The Act is neither silent nor ambiguous with respect to the scope of its coverage. Three separate sections of the Act reiterate that the disclosure and penalty provisions apply only to those creditors who impose a finance charge.

Section 1602(f) provides in applicable part:

> "The term 'creditor' refers *only* to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a *finance charge* is required . . . ." (Emphasis added.)

This definition makes it clear that, contrary to the Government's view (U. S. Br. 15-17, 20), Congress assumed that there are creditors who do not impose finance charges as well as those who do. Consistent with the declared statutory purpose to assure "[t]he informed use of credit [which] results from an awareness of the *cost* thereof" (15 U. S. C. § 1601) (emphasis added), the Act was directed at those who impose a finance charge.

The point is re-emphasized in the general disclosure requirement set forth in § 1631(a) which provides:

> "Each creditor [as defined in § 1602(f)] *shall disclose* clearly and conspicuously, in accordance with the regulations of the Board, *to each person* to whom consumer credit is extended and *upon*

whom a finance charge is or may be imposed, the information required under this part." (Emphasis added.)*

The required information includes "the amount of the finance charge" and "the finance charge expressed as an annual percentage rate" (15 U.S.C. § 1638(a)(6) and (7)).

Finally, under § 1640(a), the civil liability for failing to make the required disclosures is imposed only on "creditors" and is stated to be "twice the amount of the *finance charge in connection with the transaction*" (emphasis added), except that such liability shall not be less than $100 nor more than $1,000. In sum, the Act is addressed only to those creditors who regularly impose a finance charge; such creditors are required to disclose the finance charge to each consumer upon whom a finance charge is or may be imposed; and the civil penalty for failing to comply is measured by the amount of the finance charge in connection with the transaction. It would be hard to imagine a more explicit insistence on a limitation of the Act to situations involving a finance charge. All of those limiting phrases would be inexplicable had Congress intended the Act to apply regardless of whether a finance charge was involved.

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*Contrary to petitioner's statement that if a creditor "regularly" (15 U. S. C. § 1602(f)) imposes a finance charge "he must make the required disclosures in *all* of his credit transactions whether or not they involve a finance charge" (Pet. Br. 12), a creditor need make the required disclosures in only those transactions in which a charge "is" imposed or "may be" imposed upon the happening of a specified event (15 U. S. C. § 1631(a)), for example, the failure to pay within 30 days. The Act provides that the word " 'may' is used to indicate that an action either is authorized or is permitted." 15 U. S. C. § 1601 note at 3439; Pub. L. No. 90-321, § 503 (May 29, 1968). *See, e.g., Rainer* v. *Chemical Bank New York Trust Co.,* 329 F. Supp. 270, 273 (S. D. N. Y. 1971). Such transactions are herein referred to as entailing a finance charge. In any event, it is petitioner's contention that FPS is subject to the disclosure provisions of the Act solely by virtue of the four installment rule—irrespective of whether its transactions entail a finance charge.

Notwithstanding these manifestations of legislative purpose, the Board eliminated the Act's prerequisite of a finance charge. Regulation Z specifies the duties of a "creditor" (12 C. F. R. § 226.8(a), and defines "creditor" as a person who regularly extends "consumer credit" (12 C. F. R. § 226.2(m)). It is the Board's definition of "consumer credit" that establishes the four installment rule:

> "*Consumer credit means credit* offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and *for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.*" 12 C. F. R. § 226.2 (k) (emphasis added).

That the four installment rule seeks to expand the coverage of the Act is not disputed. The district court found FPS's transactions subject to the disclosure and civil penalty provisions of the Act solely "by virtue of the 'more than four installments' rule" (App. 34-35).* Petitioner recognizes that "the transaction is not covered by the substantive provisions of the statute" (Pet. Br. 11), and acknowledges here, as she did below, that the case against FPS turns on the validity of the four installment rule. She urges that the Board has "the power to reach transactions just outside the literal reach of the

*Petitioner maintained in the district court: "Defendant has denied any finance charge and the point is not an issue here." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 5. The Court of Appeals noted that the district court had not found a finance charge present and had relied on the four installment rule for its holding that FPS was subject to the disclosure and penalty provisions of the Act. (App. 45.)

statute" (Pet. 15) and to "go beyond the literal disclosure requirements of the Act." (Pet. Br. 8.)

Likewise, the Government recognizes, albeit grudgingly, that the four installment rule may reach "credit transactions that the provisions of the Act themselves might not cover because there are in fact no finance charges involved directly or indirectly" (U. S. Br. 9); it urges that the Board had authority to promulgate a rule which "embraces some transactions that the provisions of the Act might not, on their face, reach" (U. S. Br. 24).* A variety of arguments based on policy are advanced in support of the Board's action. We show below that those supposed policy considerations will not bear scrutiny and that the rule is in fact subversive of the purposes of the Act. First, however, we turn to petitioner's contention that the rule is not in conflict with the Act but merely serves to elaborate upon it.

It is petitioner's fundamental contention that:

> "The failure of Congress to include the instant transaction within those substantive provisions does not demonstrate any congressional intent to exempt the transaction from disclosures, but only an intent to leave regulation of the transaction to the Board." Pet. Br. 9.

This position is clearly unsound. It was easy enough for Congress to make the Act applicable to all creditors had it intended to do so. It did not do so. It specifically limited the

*To be sure, the Government also urges that Congress assumed that "whenever credit is extended the costs necessarily incurred by the creditor are in fact passed on to the consumer" (U. S. Br. 9 n.10). As we have noted above, however, the statutory definition of creditor as "only [those] creditors who regularly extend . . . credit for which the payment of a finance charge is required" is consistent only with the view that some creditors do not impose a finance charge. Moreover, as we show below, the legislative history simply does not bear out the Government's speculations as to Congress's assumptions.

scope of the Act to creditors who impose a finance charge and to transactions involving a finance charge. Futhermore, the explicit limitation of the requirements of the Act to finance charge transactions cannot rationally be said to manifest "an intent to leave regulation of [all other transactions] to the Board." Plaintiff's thesis would lead to the conclusion that the Board is authorized to regulate everything not dealt with by Congress.

Also unsound is petitioner's contention (Pet. Br. 28) that transactions not involving a finance charge are not exempted by the Act but "merely omitted from coverage" because they are not among the "exempted transactions" (*e.g.*, commercial credit, securities transactions) listed in 15 U. S. C. § 1603. Obviously, there was no need to exempt transactions not involving a finance charge because they were not covered in the first place.

In the same vein, petitioner urges (Pet. Br. 20-21) that, if the Act contained only its declaration of purpose (15 U. S. C. § 1601) and the provision authorizing the Board to issue regulations to carry out that purpose (15 U. S. C. § 1604), the four installment rule would have been entirely appropriate. Petitioner then goes on to argue, in substance, that nothing in the remaining 30 sections of the Act should be deemed to curtail that grant of authority. Congress, however, did not see fit to pass only a declaration of purpose and a grant of rulemaking authority. It did pass the rest of the Act, and the Board cannot proceed as if Congress had been silent.

The freewheeling administrative power, advocated by petitioner, to "correct any [congressional] oversights or omissions" (Pet. 13) and to alter the "lines drawn by the statute itself" (Pet. Br. 18) is peculiarly inappropriate in the circumstances of the Truth in Lending Act. Contrary to petitioner's assertion, the Act is not a mere "rough outline" (Pet. 13) of what Congress had in mind. Congress

did not merely state a broad area of concern and direct the Board to deal with it. Rather, Congress hammered out a detailed system of regulation, setting forth with precision the matters within its coverage.* "Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions." *Ebert v. Poston*, 266 U. S. 548, 554 (1925). To be sure, the Board was called upon to provide supplementary regulations,** but it was not left at liberty to reshape the Act or to revise congressional decisions.

2. The legislative history.

The legislative history of the Act demonstrates that the plain statutory language is not the result of legislative inadvertence or oversight but was the result of an affirmative congressional decision to restrict the Act's coverage to transactions involving a finance charge. Thus, the Senate-House conference report states that the Act was designed "to assist in the promotion of economic stabilization by requiring the disclosure of *finance charges* in connection with extension of credit . . . ." CONF. REP. No. 1397, 90th Cong., 2d Sess. at 1 (1968) (emphasis added). Further, the Senate Report states:

> "[Section 1631] . . . is a prefatory section setting forth the basic requirements to disclose. It is similar

*For example, § 1638(a)(7) provides for the disclosure of

> "The finance charge expressed as an annual percentage rate except in the case of a finance charge
>
> (A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or
>
> (B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.
>
> A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph."

**See, for example, 12 C. F. R. §§ 226.6(d), 226.6(j).

> to the original S. 5, except that it is made clear that disclosure need only be made to persons 'upon whom a finance charge is or may be imposed'. Thus, the disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions, including trade credit, open account credit, 30-, 60-, or 90-day credit, etc., for which a charge is not made." S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967). The House Report is substantially identical. H. R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967).

The Senate Report also states that "[t]he basic purpose of the truth in lending bill is to provide a full disclosure of credit *charges* to the American consumer." S. Rep. No. 392, 90th Cong., 1st Sess. at 1 (1967) (emphasis added). The same intent is reflected in the House Report:

> "Title I is intended to provide the American consumer with truth-in-lending and truth-in-credit advertising by providing full *disclosure of the terms and conditions of finance charges* both in credit transactions and in offers to extend credit." H. R. Rep. No. 1040, 90th Cong., 1st Sess. 6-7 (1967) (emphasis added).

The Government's brief seeks to undermine the significance of the committee reports by reference to a variety of random statements at various hearings with respect, for the most part, to bills significantly different from the one ultimately enacted.* If those statements were in conflict with

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*Many of the statements cited by the Government (*See, e.g.*, U. S. Br. 15 n.13) were made with respect to S.5 or bills similar to it. The Senate Report specifically says that the Act's disclosure provision was altered from S.5 (which required disclosure "to each person to whom credit is extended") in order to make clear that "disclosure need only be made to persons 'upon whom a finance charge is or may be im-

the language of the committee reports, the reports, of course, would be entitled to precedence as the authentic expression of the legislative intent. *See United States* v. *International Union United Automobile, Aircraft & Agricultural Implement Workers of America,* 352 U. S. 567, 585 (1957); *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 474-75 (1921); *American Airlines, Inc.* v. *CAB,* 365 F. 2d 939, 949 (D.C. Cir. 1966); *Nicholas* v. *Denver & R. G. W. R. R.,* 195 F. 2d 428, 431 (10th Cir. 1952).

Moreover, none of the statements cited in the Government's brief indicates any expectation that the Act, or the regulations to be promulgated thereunder, would apply to transactions that did not involve a finance charge. The Government calls particular attention to a statement by Senator Douglas at a Senate subcommittee hearing on S. 1740 in July 1961 (U. S. Br. 16-17). Senator Douglas's remarks were made in response to an argument advanced by Senator Bennett that two merchants selling identical goods, *both of whom imposed a finance charge,* might disclose different finance charges as a result of making different allocations between the cash purchase price and cost of credit and that, therefore, the consumer would have no valid basis for comparison shopping. In response, Senator Douglas observed that the bill would provide the consumer with disclosure of both the cash price and the finance charges so that "the judgment of the consumer can be on the basis of both of these factors, not merely on one alone . . . ." *Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 87th Cong., 1st Sess. 447-48 (1961).

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posed.'" S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967). Moreover, the definition of "credit" in S.5 was changed in the Act (§ 1602(e)) so as to exclude from the disclosure requirements those transactions where it "would seem impossible to attribute or determine a finance charge." *Hearings on S.5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 659-663 (1967).

Senator Douglas's remarks with respect to creditors who do impose a finance charge does not lend any support to the notion that Congress intended that disclosures would be required of those who do not impose a finance charge.

The Government cities (U. S. Br. 16 n. 16) other statements similar to that of Senator Douglas,* indicating a congressional concern with the problem of the identification of finance charges by those creditors who impose such charges; these statements do not indicate concern about those situations where a finance charge was not in fact being imposed. In sum, there is no support for the argument that those creditors who do not impose finance charges were intended to be reached by the Act despite its clear wording to the contrary.

On the other hand, the congressional hearings do provide further evidence that the imposition of a finance charge was understood to be a prerequisite to the Act's coverage. Thus, during the 1964 hearings before the Senate Banking and Currency Committee's Subcommittee on Production and Stabilization, a Senator asked the Chairman of the Federal Trade Commission whether an agreement with his neighbor's son under which the son would mow the Senator's lawn on successive Saturdays and the Senator would pay him 50 cents "each time he completes the job" would be within the purview of the then pending bill. *Hearings on S. 750 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking and Currency*, 88th Cong., 1st and 2nd Sess., pt. 2 at 1298 (1964). The Chairman of the Federal Trade Commission replied that the lawn mowing transactions would not be covered. He explained:

**Hearings on H. R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. 590-91, 825-26 (1967); *Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 381, 563 (1961).

"First, there must be a transaction involving 'credit' as defined in section 3(2). Second, a 'finance charge' as defined in section 3(3) must be imposed in this transaction involving 'credit' as defined in section 3(2). Third, only a 'creditor' as defined in section 3(4) is required to make the disclosure required under this act.

". . . In order to determine whether any transaction which involves credit within the meaning of section 3(2) falls within the scope of the bill, it is necessary to inquire whether a 'finance charge' is imposed; i.e., whether the borrower or credit purchaser is required to pay any amount which would not be incurred in a cash transaction." *Hearings* on S. 750 at 1304.

The Government also urges that during the seven years of hearings "everyone assumed that 'no charge for credit' simply meant that the creditor had 'buried,' 'concealed' or 'packed' finance charges in the price of the goods sold." U. S. Br. 15. As evidence of that assumption the Government quotes (U. S. Br. 15 n.14) a chief sponsor of the Act, Senator Proximire. However, moments after Senator Proxmire made the statement quoted in the Government's brief, the Senator apparently concluded that some creditors do not impose finance charges and, indeed, that the very creditor referred to in the government's quotation did not do so. Senator Proxmire said: "The fact is that Foyes is apparently not charging in his merchandise for his credit." *Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 515 (1967). That conclusion is consistent with the views expressed in the Senate and House Reports which were before the Congress that passed the Act. Those reports specify: "disclosure need

only be made to persons 'upon whom a finance charge is or may be imposed.' Thus, the disclosure requirement would not apply to transactions . . . for which a charge is not made." S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H. R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967).

Accordingly, it is apparent that the Fifth Circuit's observation that "there must be found present a '*finance charge*'" before disclosure is required under the Act (App. 49) is correct. Other lower courts have come to the same conclusion. In *Esposito* v. *Nayer*, Civil No. 11-142 (D. Me., June 5, 1972), Judge Gignoux, faced with a transaction identical in all material aspects to the one at issue here, held the four installment rule invalid, saying:

> "Absent a finance charge in the transaction involved, this Court, like the *Mourning* Court, finds the Act itself inapplicable, since neither defendant is a creditor as defined by the Act. Nor is either defendant a person required to disclose pursuant to the requirements of the Act."

See Garland v. *Mobil Oil Corp.*, 4 CCH Consumer Credit Guide ¶ 99,193 at pp. 89, 134-35 (N. D. Ill. 1972) (McLaren, J.); *Otis* v. *Cowles Communications, Inc.*, No. C-71-550 RHS (N. D. Cal., Nov. 3, 1971); *Casteneda* v. *Family Publications Service*, 4 CCH Consumer Credit Guide ¶ 99,564 (D. Colo. 1971); *Bostwick* v. *Cohen*, 319 F. Supp. 875, 878 n. 1 (N. D. Ohio 1970). *See also Martinez* v. *Family Publications Service, Inc.*, No. 71-169-Civ-TC (S. D. Fla., Oct. 12, 1971). *Contra*, *Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100 (N. D. Ill. 1971), *certified under 28 U. S. C. § 1292(b), settled on appeal.*

B. The rule does not effectuate the purpose of the Act nor does it prevent circumvention or facilitate compliance.

In support of the validity of the four installment rule, it is urged by petitioner and amici curiae that the rule is needed to solve the problem—supposedly recognized but left unsolved by Congress—of the "buried" finance charge. The problem of the buried finance charge may well be a real problem, but it is neither presented by this case nor solved by the four installment rule.

A transaction that entails a finance charge (and meets the other requirements of the Act) is indubitably subject to the requirements of the Act—whether or not the finance charge is buried or otherwise hidden. The plain language of the Act requires that the specified disclosures be made in transactions involving finance charges. Neither the Act nor the regulations make any exception for hidden finance charges.

We do not doubt that the Board could properly facilitate compliance with the Act by establishing, on any reasonable basis, guideline formulas for the identification and quantification of finance charges in difficult cases so that merchants could make disclosures with confidence that they had done what was required of them.* Similarly, the Board

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*The object of facilitating compliance has been served, *inter alia*, by the Board's regulations with respect to the determination of the annual percentage rate. Thus, 12 C. F. R. § 226.5(c) provides in part:

> "*Charts and tables.* (1) The Regulation Z Annual Percentage Rate Tables produced by the Board may be used to determine the annual percentage rate, and any such rate determined from these tables in accordance with instructions contained therein will comply with the requirements of this section."

And 12 C. F. R. § 226.5(e) provides in part:

> "In an exceptional instance when circumstances may leave a creditor with no alternative but to determine an annual percentage rate applicable to an extension of credit other than open end credit by a method other than those prescribed in

could facilitate private enforcement of the Act by establishing rebuttable presumptions as to both the existence and the amount of finance charges so that private plaintiffs would not be faced with difficult problems of discovery and accountancy. What the Board did, however, is altogether different: it simply attempted to eliminate the finance charge requirement. In doing so, it neither furthered the purposes of the Act nor facilitated compliance with it. The attempt to expand the coverage of the Act to embrace transactions not involving a finance charge cannot solve the practical problems faced by the merchant who is required to disclose a finance charge that is hard to identify, nor can it further the purpose of achieving full and accurate disclosure of the cost of credit.

The Government attempts to resolve the problem of the hard-to-identify finance charge not by reference to the four installment rule but rather by the more extraordinary proposition that the merchant may discharge his duties under the Act by merely disclosing the aggregate purchase price without separately identifying the finance charge. The Government states that "a creditor might not be required to disclose finance charges if these were concealed in increased prices" so long as he discloses "other relevant information, such as the cash price and the total amount to be financed." (U. S. Br. 16. See also 12 n. 26.) This is simply bizarre. Nothing in the Act justifies that conclusion, which appears altogether subversive of the congressional purpose to require disclosure of the cost of credit. Had Congress intended what the Government now supposes, it was a very simple thing to provide (a) that all creditors

paragraph (b) or (c) of this section, the creditor may utilize the constant ratio method of computation provided such use is limited to the exceptional instance and is not for the purpose of circumvention or evasion of the requirements of this part."

were subject to the Act (rather than only those creditors who impose a finance charge), and (b) that, in circumstances to be specified by supplementary regulation, those creditors who could not segregate the cost of credit from the total purchase price, should disclose the total price and state that it contained an unspecified finance charge. Congress, however, did no such thing. It made the Act applicable only to those creditors who impose a finance charge and it required that that finance charge be identified.

Under the Government's thesis, even the merchant who intentionally "buries" a finance charge can meet the requirements of the Act merely by disclosing the aggregate purchase price. Moreover, the merchant with no affirmative desire to conceal would no longer have any inducement under the Act to undertake the burden of accurately identifying the cost of credit. In both situations, the consumer will be denied information as to the cost attributable to credit. Since, however, neither the Act nor the regulations afford any warrant whatsoever for the Government's invitation to non-disclosure, we believe that any merchant who accepts that invitation runs a material risk of criminal prosecution under 15 U. S. C. § 1612 and of a potentially staggering civil liability under 15 U. S. C. § 1640(a). In sum, the four installment rule cannot solve the problem of the hard-to-identify finance charge to which it was addressed, and the Government's non-disclosure rule solves the problem but only by scuttling one of the Act's principal objectives without any authority from either Congress or the Board.

Finally, it is apparent that the four installment rule does not even serve the interests of administrative and judicial economy, as claimed by petitioner and the Government. (Pet. Br. 16-17; U. S. Br. 25.) If, as the Government suggests (U. S. Br. 25), "endless legal disputes over bookkeeping practices and other matters" would result in

the absence of the rule because of the need to establish the existence of a finance charge, then similar disputes will arise, notwithstanding the rule, as to the amount of the finance charge and the accuracy of the disclosures. Those who are prompted to sue merchants making no disclosures would, if the rule were sustained, sue merchants making allegedly inaccurate disclosures—including merchants who, rightly or wrongly, would disclose that no finance charges were entailed in their transactions. So long as the Act provides that a finance charge must be accurately disclosed, the existence and amount of such charges will be a central element in litigation under the Act. Whatever the problems of proof involved, the four installment rule does not obviate them. On the other hand, in so far as the Board seeks to expand the coverage of the Act to embrace classes of merchants and transactions not covered by Congress, it can only increase the amount of litigation engendered by the Act.

C. The four installment rule is an invalid administrative attempt to extend the Act beyond its intended bounds.

Petitioner ultimately relies on the proposition that the Board was authorized to promulgate "legislative" as well as merely "interpretive" regulations and, thus, was empowered to "correct any oversight or omissions" in the Act, to "embrace a penumbra" beyond the objectives of the Act and to alter "the lines drawn by the statute itself" (Pet. Br. 18, 22, 32; Pet. 13). The argument proves either too little or too much. Since, as we have shown above, Congress explicitly and intentionally limited the coverage of the Act to transactions involving a finance charge, the exclusion of transactions not involving a finance charge can hardly be regarded as a legislative "oversight or omission". On the other hand, there is no warrant in the decisions of this

Court for the proposition that an administrative agency, however well intentioned, may simply overrule a congressional decision under the guise of exercising "legislative rule making power" (Pet. Br. 22). The legislative power of the United States is, after all, granted to Congress (U. S. Const., art. I, § 1), and while Congress may delegate legislative power under appropriate guidelines, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940); *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 282 U. S. 311, 324 (1931), an intent to delegate the power to override congressional determinations is not readily to be presumed, nor can it be inferred from anything in the Truth in Lending Act.

The court of appeals held that "the four installment rule of Regulation Z constituted an administrative endeavor to amend the law as enacted by the Congress" (App. 51). The court's conclusion that the Board, in promulgating the rule, had "over-stepped the authority granted to them under 15 U. S. C., § 1604" (App. 51) is clearly supported by the decisions of this Court.

In *Federal Communications Commission* v. *American Broadcasting Co., Inc.*, 347 U. S. 284 (1954), this Court was faced with an attempt by the Federal Communications Commission to prevent circumvention and evasion of § 1304 of the United States Criminal Code (formerly § 316 of the Communications Act of 1934). The statute prohibits the broadcasting of "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . ." Although the statute did not define "lottery", lotteries traditionally had been considered to have three essential elements: (1) the distribution of prizes (2) according to chance (3) for a consideration. 347 U. S. at 290.

In promulgating rules designed to prevent the broadcasting of programs prohibited by the statute, the Com-

mission was faced with a pervasive pattern of circumvention by lottery promoters. As this Court noted:

> "Enforcing such legislation has long been a difficult task. Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity, usually turned on whether the scheme, on its own peculiar facts, constituted a lottery." 347 U. S. at 292-93.

In particular, the question of what constituted "consideration" was one that had continually troubled the courts, and promoters had persistently exercised their ingenuity in devising new schemes, not previously prohibited. 347 U. S. at 293. The Commission, seeking to prevent continued circumvention and evasion of the statute and to achieve what it believed to be a valuable social end, adopted a regulation that eliminated consideration as a necessary element of a proscribed lottery. This Court held that the Commission had overstepped its authority under the Act. The Court said:

> "Unless the 'give-away' programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action. Thus, reduced to its simplest terms, the issue before us is whether this type of program constitutes a 'lottery, gift enterprise, or similar scheme' proscribed by § 1304." 347 U. S. at 290.

In commenting on the circumvention argument, the Court said:

> "It is apparent that these so-called 'give-away' programs have long been a matter of concern to the

> Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit. . . . Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy." 347 U. S. at 296-97.

The instant case involves an even clearer example of invalid legislation-by-regulation since here one need not scrutinize the intricacies of the common law to ascertain the boundaries of the statutory requirement. The disclosure and penalty provisions of the Truth in Lending Act explicity apply only to transactions involving a finance charge.

It should also be noted that in *ABC,* as here, the Court was faced with a civil case arising under a statute that also provided for criminal penalties. The Court said:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly." 347 U. S. at 296.

See Commissioner v. *Acker,* 361 U. S. 87, 91 (1959); *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362 (1905).

This Court emphasized the inability of an administrative agency to go beyond its enabling act in *Addison* v.

Holly Hill Fruit Products, Inc., 322 U. S. 607 (1944). The *Addison* case arose under Section 13(a)(10) of the Fair Labor Standards Act, which exempted from the minimum wage and overtime requirements of the statute persons employed "within the area of production (as defined by the Administrator)" in certain agricultural occupations. Pursuant to that authority the Administrator defined "area of production" to include any person engaged in such an occupation "where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven". 29 C. F. R. § 536.2 (b) (Supp. 1938). Notwithstanding the fact that the definition of that term was expressly left to the Administrator, this Court held that the Administrator's power to define "area of production" was limited by that statutory term to the drawing of geographic lines and that his regulations, which made discriminations on the basis of the number of employees, were *ultra vires*. *See also Zuber* v. *Allen*, 396 U. S. 168, 183 (1969) ("Congress has spoken with particularity. . . . In these circumstances an administrator does not have 'broad dispensing power.' "); *Commissioner* v. *Acker*, 361 U. S. 87, 93-94 (1959) ("The questioned regulation must therefore be regarded 'as no more than an attempted addition to the statute of something which is not there.' "); *United States* v. *Calamaro*, 354 U. S. 351, 357 (1957) ("Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon."); *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107, 113 (1942).

Further, the four installment rule is invalid for the reasons set forth in *Miller* v. *United States*, 294 U. S. 435 (1935). In *Miller*, the plaintiff sought judgment upon a war risk insurance policy, issued by the United States pursuant to a statute authorizing protection against the risk of death or "total permanent disability." The Administrator

of Veterans' Affairs, purporting to act pursuant to authority to make such rules and regulations as might be necessary or appropriate to carry out the purposes of the act, had provided by regulation that the loss of one hand and one eye "shall be deemed to be total permanent disability under yearly renewable term insurance". That regulation the Court held invalid because it converted "total permanent disability" from a factual condition to be determined in light of all the relevant circumstances into a matter to be presumed upon the finding of more limited, specific facts. The Court observed:

> "It is invalid because not within the authority conferred by the statute . . . to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. . . . *The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power.* The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Id.* at 439-40 (emphasis added).

The same vice is present in the four installment rule. The rule converts what under the Act is a question of fact requiring proof (whether there is a finance charge) into a conclusive presumption which dispenses with proof.*

*"In effect, the rule establishes a conclusive presumption that those who extend credit and permit payment in four or more installments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they may purport not to levy a finance charge. In the vast majority of cases, that presumption is in full accordance with economic reality . . . . While it is possible that there are some creditors who

The cases cited by petitioner and the Government are quite simply inapposite and do not support the validity of the four installment rule. A comparison of the statute and regulation involved in each of the cases cited fails to reveal any conflict between the act and the regulation. *Gemsco, Inc.* v. *Walling*, 324 U. S. 244 (1945), *Thorpe* v. *Housing Authority*, 393 U. S. 268 (1969), *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964), and *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), all involved agency regulations or adjudications which merely constituted particularizations of the respective statutes as to matters about which Congress had not spoken with specificity and were not in any way inconsistent with an act of Congress. (324 U. S. at 261-63; 393 U. S. at 277-78, 379 U. S. at 215-217, 319 U. S. at 218-20.)*

POINT II

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUSTAINED ON THE GROUNDS, NOT REACHED BELOW, THAT A CIVIL PENALTY UNDER THE ACT MAY NOT BE IMPOSED IN THE ABSENCE OF A FINANCE CHARGE AND THAT FPS DID NOT EXTEND CREDIT WITHIN THE MEANING OF THE ACT.

Although the decision of the court of appeals is based entirely on the invalidity of the four installment rule, the judgment is sustained by two independent considerations that were advanced by FPS but which the court of appeals

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agree to permit payment in four or more installments without structuring the cost of extending credit into the price . . . an administrative agency . . . must be permitted to make rough accommodations even if its classifications result in some inequity . . . ." U. S. Br. in the Fifth Circuit at 24-25.

*In *United States* v. *Foster*, 233 U. S. 515, 527 (1914), the Court found the regulation there in issue to be purely administrative and said it "executed the . . . law; [but] adds nothing to it". That

did not reach.* First, we urged that, irrespective of the validity of the four installment rule, 15 U. S. C. § 1640(a) provides for civil liability only in cases involving a finance charge.** Second, we showed that the Truth in Lending Act is inapplicable here because the transaction in issue did not involve the extension of credit.*** For the reasons set forth below, the judgment of the court of appeals should be sustained on both of those grounds, regardless of this Court's determination with respect to the validity of the four installment rule. *See, e.g., Le Tulle* v. *Scofield*, 308 U. S. 415, 421 (1940), *Langnes* v. *Green*, 282 U. S. 531, 538 (1931); *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924).

A. The civil penalty provision of the act is inapplicable in the absence of a finance charge.

Whether or not the disclosure requirements and the administrative enforcement provisions of the Truth in Lending Act are applicable in the absence of a finance charge, the civil liability provision, under which petitioner's claim arises, is inapplicable. The Act provides that

> "any creditor who fails in connection with any consumer credit transaction to disclose to any person

Congress can paint with a broad brush, and ban more than the target evil, *North American Co.* v. *SEC*, 327 U. S. 686 (1946), *Westfall* v. *United States*, 274 U. S. 256 (1927), is irrelevant to the issue present here of whether an agency can promulgate rules contrary to the express language of the enabling statute. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963), did not involve the rule-making power of an agency, but rather the validity of a state statute in a field which Congress had sought to regulate. The conclusion there as to the scope of federal preemption has no bearing here.

*Petitioner's Reply Memorandum on Petition for Writ of Certiorari 3; U. S. Br. 4 n.4.

**FPS's Brief in the Fifth Circuit 26-30; FPS's Reply Brief in the Fifth Circuit 5-6.

***FPS's Brief in the Fifth Circuit 8-13; FPS's Reply Brief in the Fifth Circuit.

any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

> "(1) *twice the amount of the finance charge in connection with the transaction,* except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
>
> "(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(a) (emphasis added).

Under that provision, the finance charge imposed "in connection with the transaction" provides the initial measure of the award. The minimum and maximum dollar amounts cannot reasonably be construed as providing an alternative means of determining the amount of liability in the absence of a finance charge because the language of § 1640(a) is not susceptible of an "either/or" interpretation. Indeed, Congress rejected a bill that provided for liability "in the amount of $100, *or* in any amount equal to twice the finance charge . . . whichever is the greater [up to $1,000]". S. 5, 90th Cong., 1st Sess. § 7(a)(1)(1967) (emphasis added). Moreover, this restriction in the scope of the civil liability section was accompanied by a shift in emphasis to other modes of enforcement. Thus, while the Senate bill had placed primary reliance on civil actions for insuring compliance, provision was subsequently made for administrative enforcement by, *inter alia,* the Federal Home Loan Bank Board, the Interstate Commerce Commission, the Civil Aeronautics Board, Secretary of Agriculture, and the Federal Trade Commission (15 U. S. C. § 1607), and it was expected that "primary enforcement . . . would be

accomplished under the administrative enforcement section." H. R. REP. No. 1040, 90th Cong., 1st Sess. at 19 (1967). Whatever the scope appropriate to the other provisions of the Act, it is apparent from both the language and history of § 1640(a) that an action to recover a civil penalty can only be maintained with respect to a transaction involving a finance charge.*

Two further considerations lead to the same conclusion. First, the Board has not promulgated any regulations dealing with the recovery of a civil penalty under § 1640(a). Hence, it is appropriate to read that section at least in the light of the statutory definitions rather than those adopted by the Board for other purposes. Section 1640(a) deals with the liability of a "creditor"—a term which the Act defines to refer "only to creditors who regularly extend . . . credit for which the payment of a finance charge is required" (15 U. S. C. § 1602(f)). Second, since Congress recognized that liability under § 1640(a) is penal rather than remedial in nature (*see* 15 U. S. C. § 1612) a narrow construction is particularly appropriate.** *Commissioner* v. *Acker,* 361 U. S. 87, 91 (1959); *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362 (1905) ("a penalty is not to be readily implied"); *Hatfield, Inc.* v. *Commissioner,* 162 F. 2d 628, 633 (3d Cir. 1947) ("all questions of doubt must be resolved in favor of those from whom the penalty is sought").

***Ratner* v. *Chemical Bank New York Trust Co.,* 329 F. Supp. 270, 273, 280 (S. D. N. Y. 1971) does not stand for a contrary proposition since the court there found that "there was a readily knowable 'finance charge in connection with the transaction'" and that this prerequisite serves as the "initial step" in the statute's "sole measure of damage". 329 F. Supp. at 280.

**A Congressional determination that a statutory provision is to be regarded as either penal or remedial is binding upon the courts. *Helwig* v. *United States,* 188 U. S. 605, 613 (1903). *See also United States* v. *United Mine Workers,* 330 U. S. 258, 303-304 (1947).

B. FPS did not extend credit.

It is undisputed that the disclosure and civil penalty provisions of the Act apply only to transactions involving the extension of credit. The terms of the agreement between petitioner and FPS are also undisputed. (App. 3, 6-7) Those terms do not spell out an agreement for the extension of credit to petitioner.*

It is the essence of a credit transaction that one person parts with goods in return for the promise of another to render value at a later date. FPS does not deliver goods before receiving payment for them. Quite the contrary, it is the customer who pays in advance for the later receipt of magazines. The customer pays over 30 months for magazines he will receive over 60 months. Until the last magazine has been delivered at the end of the 60-month period, the customer has paid for more magazines than he has received. Thus, if any credit is extended in these transactions, it is extended by FPS's customers to FPS and not vice versa. FPS enjoys the use of its customers' money before the customers obtain the magazines.

Nor does the fact that the customer contracts to make periodic payments turn his obligation into a credit obligation. There are many contractual relationships which are not credit relationships. As Professor Corbin has stated:

> "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without

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*The question of whether the transaction in issue involves the extension of credit was not reached by the court below. See p. 33 n. * *supra*. The Government, in its amicus curiae brief, declined to express its opinion on the issue. The Government stated:

> "Since the validity of the four-installment rule is unrelated to that question, the Board has no interest in urging that it be decided one way or the other." (U. S. Brief in the Fifth Circuit 13.)

promising to render any performance in advance of full payment of the price of each instalment so rendered. Thus, a seller contracts to deliver wheat straw at the rate of three specified loads per fortnight, for the price of thirty-three shillings per load, payable on delivery; simultaneously with each delivery, the full price of each load is to be paid. Both parties promise to perform in instalments; but neither one promises any performance in advance of its exact agreed equivalent. Neither one risks an actual performance upon the mere word of the other." 3A A. CORBIN, CONTRACTS § 687 (1960) (footnote omitted).

In sum, a promise to make periodic deliveries in exchange for a promise to make periodic payments does not in itself give rise to a credit transaction. The fact that the FPS customer completes his periodic payment obligations under the contract before FPS has completed its performance shows that FPS is even more clearly not a creditor than the seller described by Professor Corbin. The conclusion that installment contracts are not necessarily contracts for the extension of credit has been recognized by the Federal Reserve Board in a published opinion with respect to the applicability of the Act to installment plans for the payment of obstetrical services:

"As we understand the common practice for assessing obstetrical charges, the doctor and the patient agree on the services the doctor will provide and the fee for his services. This fee is payable in periodic instalments, and the obstetrical services are provided as needed. Perhaps early in the plan, the payments made by the patient exceed the charges assessed, but as the plan progresses and the child is

> delivered, it may be that the charges exceed the payments. As long as there are no finance charges assessed, and at no point do the charges for the services rendered exceed the payments to the extent that it would require more than 4 of the periodic installments to repay the obligation, then the plan would not fall within the provisions of Regulation Z." FRB Opinion Letter No. 262 (1970); 4 CCH CONSUMER CREDIT GUIDE ¶ 30,516.

It is implicit in the Board's opinion (1) that the execution of an agreement to pay in installments for goods or services to be rendered in installments does not necessarily involve an extension of credit within the meaning of the Act and (2) that credit is extended under such an agreement only if and when the value of the goods or services provided exceeds the payments made.*

Accordingly, FPS does not extend credit to its customer upon the execution of the installment agreement and, since the customer undertakes to make payments at a faster rate

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*The Government has characterized the Board's opinion as follows:

> "The Federal Reserve Board has issued an opinion letter . . . which may bear on the question presented here. That opinion, which deals with the common situation involving the payment in installments of a fixed fee for whatever obstetrical care may be needed during a pregnancy, seems to be based on the premise that the patient does not incur indebtedness for the total fee at the time, early in the pregnancy, when the agreement is made. Instead, the view reflected in that letter seems to be that *debt is not incurred, nor credit extended, until the medical care is actually provided and then only if the amount of the payments made by that time does not equal or exceed the value of the services rendered.* Stated otherwise, insofar as is relevant here, the opinion appears to adopt the view that, even if no payments were made, the patient would not incur debt simply by arranging with the obstetrician for periodic care and agreeing to pay, in installments, a specified sum for whatever care is needed." U. S. Brief in the Fifth Circuit 17. (Emphasis added.)

Once magazines are delivered, FPS does not thereafter extend credit under the agreement. Indeed, in an effort to insure that FPS does not become a creditor, the agreement provides for acceleration of the customer's payments in the event of the customer's default. In sum, under commonly accepted principles that have been espoused by the Board, FPS is not a creditor.

The Act does not alter the common understanding of what constitutes a credit transaction*—receipt of value and an unconditional obligation to pay in the future for such value. The term "credit" is defined in the Act as follows:

> "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(e).

The word "debt" is not defined in the Act. "Debt" has been defined, however, frequently and consistently by the courts. The essence of "debt" is an unconditional promise to pay a fixed sum at a future time.

> "The classic debt is an unqualified obligation to pay a sum certain at a reasonably close fixed maturity date along with a fixed percentage in interest payable regardless of the debtor's income or lack thereof." *Gilbert* v. *Commissioner,* 248 F. 2d 399, 402 (2d Cir. 1957). *Accord, Sherwood Memorial Gardens, Inc.* v. *Commissioner,* 350 F. 2d 225 (7th Cir.

* "[T]he disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions . . . ." S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H. R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967). "It did not attempt to alter or amend the pattern of legal rights and remedies afforded consumers and creditors under state law." 114 Cong. Rec. 14487 (1968) (remarks of Senator Proxmire).

1965); *Forbey Realty Corp.* v. *Commissioner,* 279 F. 2d 701 (2d Cir. 1960).

"Every debt must be solvendum in praesenti, or solvendum in futuro—must be certain and in all events payable; whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a debt." *Burton* v. *Bowers,* 172 F. 2d 429, 432 (4th Cir. 1949) (citations omitted). *Accord, Gilman* v. *Commissioner,* 53 F. 2d 47 (8th Cir. 1931); *State* v. *Smith,* 335 Mo. 825, 74 S. W. 2d 367 (1934).

"A 'debt', of course, is commonly considered to be a fixed and certain obligation, as opposed to something payable only on a contingency." *Jaramillo* v. *McLoy,* 263 F. Supp. 870, 874 n. 3 (D. Colo. 1967). *Accord, Jamison* v. *United States,* 297 F. Supp. 221, 227 (N. D. Cal. 1968), *aff'd per curiam,* 445 F. 2d 1397 (9th Cir. 1971).

A debt is to be distinguished from the binding obligations of a contract under which the performance of both parties lies in the future. *See, e.g., United States* v. *New York, New Haven and Hartford R. R.,* 276 F. 2d 525, 530 (2d Cir. 1959), *cert. denied,* 362 U. S. 961, 964 (1960); *McGee* v. *Stockes' Heirs at Law,* 76 N. W. 2d 145, 156 (N. D. 1956). A debt is not merely a promise to pay money. *Evans* v. *Kroh,* 284 S. W. 2d 329, 330 (Ky. Ct. App. 1955); *Park & 46th St. Corp.* v. *State Tax Commission,* 295 N. Y. 173, 178, 65 N. E. 2d 763, 765 (1946). Thus, for example, in deciding whether a municipality's contract to pay for water services resulted in indebtedness in excess of the permissible debt limit, the Court in *Walla Walla City* v. *Walla Walla Water Co.,* 172 U. S. 1, 20 (1898), made the following distinction:

"There is a distinction between a debt and a contract for a future indebtedness to be incurred, pro-

vided the contracting party performs the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed." (Emphasis added).

See also Metropolitan Water District v. *Marquardt*, 59 Cal. 2d 159, 379 P. 2d 28, 28 Cal. Rep. 724 (1963).*

The FPS contract calls for performance in overlapping installments by both parties and is therefore inherently conditional. The customer's obligation to pay money is contingent upon continuing partial performance by FPS. As Professor Corbin has explained,

> "A contract for the sale of goods may be an instalment contract with respect to the goods sold as with respect to payments of the price. The non-delivery of an instalment or delivery of a nonconforming instalment when required by the contract is a breach for which an action can be maintained at once. There

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*The term "debt" is given the same construction for federal income tax purposes as the Supreme Court gave it in *Walla Walla*. There is no valid debt which would allow a bad debt deduction under § 166 of the Internal Revenue Code unless someone had an *unconditional* obligation to pay the taxpayer. See cases collected in 5 J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 30.03 n.29 (1969). The existence of a note is not in itself conclusive of the existence of a debt. *John Kelley Co.* v. *Comm'r*, 326 U. S. 521, 530 (1946).

is no doubt also that the buyer is privileged to withhold payment of the price of the undelivered instalment or of a nonconforming instalment that is rightfully rejected." 3A A. CORBIN, CONTRACTS § 691, at 264 (1960).

In the circumstances described by Professor Corbin the buyer is obligated to pay only if the seller performs. Hence, the buyer has not incurred an unconditional obligation—*i.e.*, he has not incurred a debt nor received credit; the contractual obligation is conditional, whereas a debt must be certain.

The district court rested its conclusion that FPS extended credit to petitioner on three propositions: (1) "the promise to pay is unconditional and non-cancellable"; (2) "the written agreement provides that '[p]ayments due monthly, otherwise entire balance due' "; and (3) "Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff." (App. 34). The first proposition is incorrect as a matter of law. The second proposition is not relevant to the conclusion reached. The third proposition is neither correct nor relevant.

With respect to the first proposition, as shown above, petitioner's promise to pay was conditional as a matter of law. Certainly, if petitioner had not received her magazines, no court would have required her to continue making payments for them. *See* FLA. STAT. §§ 672.2-612, 672.2-711, 672.2-717 (1969). *Cf., Bowers* v. *Dr. P. Phillips Co.*, 100 Fla. 695, 129 So. 850 (1930). The fact that the contract was noncancellable at the election of petitioner does not make her obligation to perform unconditional. Her obligation was conditional on performance by FPS. See 3A A. CORBIN, CONTRACTS §§ 687, 691 (1960).

With respect to the second proposition, the fact that under the agreement FPS could require payment of the full balance if petitioner, in breach of the agreement, defaulted does not show that FPS undertook to extend credit. At every stage in the transaction the petitioner was to pay in advance for the magazines she was to receive. The "balance due" clause only underscores FPS's determination that magazines not be delivered prior to payment so that it would not be put in the position of a creditor, either voluntarily or involuntarily, and that the customer be held to her initial undertaking for prepayment.

Finally, the district court's statement that FPS "considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff", (App. 34) presumably refers to collection letters sent petitioner after she failed to make payments. Surely the fact that petitioner *became* indebted when she failed to pay, although she was receiving the magazines she had ordered, does not show that the contract provided for the creation or deferment of such debt. Petitioner's breach of her contractual obligation to make prepayment did not retroactively convert the underlying transaction into a credit transaction within the meaning of the Act. *Cf.* 12 C. F. R. § 226.4(c). Just as a store can hardly be said to extend credit to a shoplifter, such an involuntary extension of credit does not convert the original agreement into a credit transaction subject to the Act. In any event, FPS' characterization of the status of the transaction after petitioner's default is not determinative of the legal significance of the original agreement. *See Garland* v. *Mobil Oil Corp.*, 4 CCH *Consumer Credit Guide* ¶ 99,193 at p. 89,135 (N. D. Ill. 1972) (McLaren, J).

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

September 2, 1972.

Respectfully submitted,

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APPENDIX

The Truth in Lending Act, 15 U. S. C. §§ 1601-65 (1970) provides in relevant part:

§ 1601. Congressional findings and declaration of purpose.

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

§ 1602. Definitions and rules of construction

* * * * *

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise. The provisions of this subchapter apply to any such creditor, irrespective of his or its status as a natural person or any type of organization.

* * * * *

§ 1603. Exempted transactions.

This subchapter does not apply to the following:

(1) Credit transactions involving extensions of credit for business or commercial purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000.

(4) Transactions under public utility tariffs, if the Board determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

§ 1604. Rules and regulations.

The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

§ 1607. Administrative enforcement.

(a) Enforcing agencies.

Compliance with the requirements imposed under this subchapter shall be enforced under

(1) section 1818 of Title 12, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 1426(i), 1437, 1464(d), and 1730 of Title 12, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

(b) Violations of this subchapter deemed violations of pre-existing statutory requirements; additional agency powers.

For the purpose of the exercise by any agency referred to in subsection (a) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (a) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter, any other authority conferred on it by law.

(c) Federal Trade Commission as overall enforcing agency.

Except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to some other Government agency under subsection (a) of this section, the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this subchapter shall be deemed a violation of a require-

ment imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

(d) Rules and regulations.

The authority of the Board to issue regulations under this subchapter does not impair the authority of any other agency designated in this section to make rules respecting its own procedures in enforcing compliance with requirements imposed under this subchapter.

§ 1611. Criminal liability for willful and knowing violation.

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder,

(2) uses any chart or table authorized by the Board under section 1606 of this title in such a manner as to consistently understate the annual percentage rate determined under section 1606 (a)(1)(A) of this title, or

(3) otherwise fails to comply with any requirement imposed under this subchapter,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

§ 1612. Penalties inapplicable to governmental agencies.

No civil or criminal penalty provided under this subchapter for any violation thereof may be imposed upon the United States or any agency thereof, or upon any State or political subdivision thereof, or any agency of any State or political subdivision.

§ 1631. General requirement of disclosure.

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

* * * * *

§ 1638. Sales not under open end credit plans.

(a) Required disclosures by creditor.

In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:

(1) The cash price of the property or service purchased.

* * * * *

(4) All other charges, individually itemized, which are included in the amount of the credit

extended but which are not part of the finance charge.

(5) The total amount to be financed (the sum of the amount described in paragraph (3) plus the amount described in paragraph (4)).

(6) Except in the case of a sale of a dwelling, the amount of the finance charge, which may in whole or in part be designated as a time-price differential or any similar term to the extent applicable.

(7) The finance charge expressed as an annual percentage rate except in the case of a finance charge.

(A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or

(B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.

A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph.

* * * * *

§ 1640. Civil liability.

(a) Failure to disclose.

Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of . . . .

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

* * * * *

The regulations of the Federal Reserve Board, 12 C. F. R. §§ 226.1-.13 (1972) provide in relevant part:

§ 226.1 Authority, scope, purpose, etc.

(a) *Authority, scope, and purpose.* (1) This part comprises the regulations issued by the Board of Governors of the Federal Reserve System pursuant to title I (Truth in Lending Act), and title V (General Provisions) of the Consumer Credit Protection Act, as amended (15 U. S. C. section 1601 et seq.). Except as otherwise provided herein, this part applies to all persons who in the ordinary course of business regularly extend, or offer to extend, or arrange, or offer to arrange, for the extension of consumer credit as defined in paragraph (k) of § 226.2, and to all persons who issue credit cards.

(2) This part implements the Act, the purpose of which is to assure that every customer who has need for consumer credit is given meaningful information with respect to the cost of that credit which, in most cases, must be expressed in the dollar amount of finance charge, and as an annual percentage rate computed on the unpaid balance of the amount financed. Other relevant credit information must also

be disclosed so that the customer may readily compare the various credit terms available to him from different sources and avoid the uninformed use of credit. This part also implements the provision of the Act under which a customer has a right in certain circumstances tp cancel a credit transaction which involves a lien on his residence. Advertising of consumer credit terms must comply with specific requirements, and certain credit terms may not be advertised unless the creditor usually and customarily extends such terms. This part also contains prohibitions against the issuance of unsolicited credit cards and limits on the cardholder's liability for unauthorized use of a credit card. Neither the Act nor this part is intended to control charges for consumer credit, or interfere with trade practices except to the extent that such practices may be inconsisent with the purpose of the Act.

* * * * *

§ 226.2 Definitions and rules of construction.

For the purposes of this part, unless the context indicates otherwise, the following definitions and rules of construction apply:

* * * * *

(k) "Consumer credit" means credit offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four install-

ments. "Consumer loan" is one type of "consumer credit."

* * * * *

(m) "Creditor" means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit.

* * * * *

(bb) Unless the context indicates otherwise, "credit" shall be construed to mean "consumer credit," "loan" to mean "consumer loan," and "transaction" to mean "consumer credit transaction."

* * * * *

§ 226.4 Determination of finance charge.

* * * * *

(c) *Late payment, delinquency, default, and reinstatement charges.* A late payment, delinquency, default, reinstatement, or other such charge is not a finance charge if imposed for actual unanticipated late payment, delinquency, default, or other such occurrence.

* * * * *

§ 226.5 Determination of annual percentage rate.

* * * * *

(c) *Charts and tables.* (1) The Regulation Z Annual Percentage Rate Tables produced by the Board may be used to determine the annual percentage rate, and any such rate determined from these tables in accordance with instructions contained

therein will comply with the requirements of this section. Volume I contains Table FRB—100-M covering 1 to 60 monthly payments, Table FRB—200-M covering 61 to 120 monthly payments, Table FRB—300-M covering 121 to 480 monthly payments, and Table FRB—100-W covering 1 to 104 weekly payments. Volume I also contains instructions for use of the tables in regular transactions and most irregular transactions which involve only odd first and final payments and odd first payment periods. Volume II contains factor tables and instructions for their use in connection with the tables in Volume I in the computation of annual percentage rates in any type of irregular payment or payment period transaction and in transactions involving multiple advances. Each volume is available from the Board in Washington, D.C. 20551, and the Federal Reserve Banks.

* * * * *

(e) *Approximation of annual percentage rate—other credit.* In an exceptional instance when circumstances may leave a creditor with no alternative but to determine an annual percentage rate applicable to an extension of credit other than open end credit by a method other than those prescribed in paragraph (b) or (c) of this section, the creditor may utilize the constant ratio method of computation provided such use is limited to the exceptional instance and is not for the purpose of circumvention or evasion of the requirements of this part. Any provision of State law authorizing or requiring the use of the constant ratio method or any method of computing a percentage rate other than those prescribed in paragraphs (b) and (c) of this section

does not justify failure of the creditor to comply with the provisions of those paragraphs, as applicable.

§ 226.6 General disclosure requirements.

* * * * *

(d) *Multiple creditors; joint disclosure.* If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. The disclosures required under paragraphs (b) and (c) of § 226.8 shall be made by the seller if he extends or arranges for the extension of credit. Otherwise disclosures shall be made as required under paragraphs (b) and (d) of § 226.8.

* * * * *

(j) *Percentage rate as dollars per hundred.* Prior to January 1, 1971, any rate required under this part to be disclosed as a percentage rate may, at the option of the creditor, be expressed in the form of the corresponding ratio of dollars per hundred dollars using the term "dollars finance charge per year per $100 of unpaid balance." (For example, an add-on finance charge of 4 percent per year on an obligation payable in 36 equal monthly instalments is equivalent to an annual percentage rate, rounded to the nearest quarter of 1 percent, of 7.50 percent which may be stated as "$7.50 finance charge per year per $100 of unpaid balance.")

* * * * *

§ 226.8 Credit other than open end—specific disclosures.

(a) *General rule.* Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction.

* * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING,
Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

The Federal Reserve Board Was Authorized To Prescribe The Four Instalment Rule.

The central issue in the instant case is the nature of the rule making power conferred upon the Federal Reserve Board by 15 U.S.C. § 1604. That section specifically authorizes the Board to prescribe regulations to prevent circumvention or evasion of the Act, and further authorizes regulations to effectuate its purposes. The expressly stated

purpose of the Act is "to assure a meaningful disclosure of credit terms", and is in no way limited to credit which happens to involve a finance charge.

Defendant adduces authorities for such general propositions as that administrative agencies cannot alter the meaning of criminal statutes, *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954); that the power to draw geographical lines does not entail the power to make other distinctions, *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944); and that the power to make regulations to carry out a statute does not include the power to amend it, *Miller* v. *United States*, 294 U.S. 435 (1935). In the cases relied on by defendant, however, the invalidated regulations did not rest upon grants of authority in any way similar to 15 U.S.C. § 1604. In *Federal Communications Commission* v. *American Broadcasting Co.*, the Commission had no express rule making authority whatever; its authority was limited to a presumed inherent power to enforce any existing criminal provision and to clarify its meaning. 347 U.S. 288, 290 n.7. *Addison* v. *Holly Hill Fruit Products*, involved no broad rule making authority, only a statute empowering the Administrator to define the geographical areas within which the Fair Labor Standards Act would be inapplicable. The fact that that authority did not permit distinctions based on the size of an employer casts little light on the meaning of § 1604. In *Miller* v. *United States*, the Director of the Bureau of Veterans Affairs sought to use his authority to carry out the purposes of the World War Veterans Act to define "total disability" to include certain specific types of injuries. But the Director's power in that case was expressly limited in three ways not present in section 1604— the rules and regulations had to be consistent with the substantive provisions of the Act, the rules had to aid the

administration, execution and enforcement of those provisions, and the Act itself contained no general statement of purpose whatever.[1]

The interpretation which defendant would place on section 1604 can best be divined from what defendant states the Federal Reserve Board *could* do thereunder. Defendant suggests it would be entirely proper for the Board to establish "rebuttable presumptions as to both the existence and the amount of finance charges" to aid private plaintiffs suing in the Federal courts and alleging hidden finance charges. Defendant's proposal, of course, goes beyond the literal command of the statute. Section 1640, authorizing private actions, does not reverse the usual rule that the burden of proof must be met by the plaintiff. The statute does provide several express exceptions to this rule, §§1640(c) (d), but that urged by defendant is not among them. Defendant does not explain why the Board could promulgate for use in the federal courts an evidentiary rule not found in the Act itself, but could not promulgate a disclosure rule not contained in the Act. Defendant manifestly believes that a presumption would be a more effective answer to hidden finance charges than disclosure, but that choice of method is delegated under the statute to the Federal Reserve Board.

Defendant urges at length that the purpose of the Truth in Lending Act as shown by its legislative history was to require disclosure of finance charges. But the legislative history quoted cannot override the express statement of

[1] 40 Stat. 398, 399 "That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes. . . ."

purpose in section 1601 which makes no mention of finance charges:

> It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

Even to the extent that the Congressional purpose was to inform consumers about the amount of finance charges, that does not mean that the only method which Congress would tolerate for providing that information was requiring disclosures by creditors who did in fact impose finance charges.

II.

The Judgment of the Court of Appeals Should Not Be Sustained On Other Grounds.

This Court granted certiorari to decide the validity of the four installment rule, a question of great import to the continued vitality of the Truth in Lending Act. The additional grounds urged by defendant in support of the judgment of the Court of Appeals were not ruled on by that court, involve complicated questions of fact, and lack the importance of the question which this Court granted a hearing to decide. Plaintiff first maintains that these additional arguments are sufficiently insubstantial to warrant summary rejection by this Court. At the least, should the Court uphold the validity of the four installment rule but conclude that detailed consideration of these other questions is warranted, it should "decline to address them in the first instance," and the case should be remanded to the Fifth Circuit Court of Appeals. *Branzburg* v. *Hayes*, —— U.S. ——, 33 L.Ed.2d 626, 655 (1972); *N.L.R.B.* v. *Scrivener*, 405 U.S. 117, 126 (1972).

A. The Imposition of a Finance Charge Is Not a Precondition of Recovery Under Section 1640(a).

Section 1640(a) provides in part:

> (a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to . . . (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000.

Defendant contends that this section only provides for damages when and if a finance charge is in fact imposed.

Defendant's contention flies in the face of the literal language of the section. Liability is imposed on "*any* creditor," not "any creditor who imposed a finance charge"; damages are owed to "*any* consumer" not "any consumer on whom a finance charge is imposed"; the section deals with non-disclosure of "*any* information," not "any information in connection with a transaction in which a finance charge was imposed." Defendant urges that Congress, having deliberately refused to place a requirement of the imposition of a finance charge in the first part of section 1640(a), secreted it by the implications in subsection (1). This construction can only be upheld if we ignore the literal meaning of the words "liability under this paragraph shall not be less than $100," and assume that, although it used the word "except," Congress did not intend to create an exception to any implied requirement of a finance charge arguably inherent in the phrase, "twice the amount of the finance charge."

The legislative history of section 1640(a) reveals no intent or suggestion that recovery be limited to persons upon whom finance charges have been imposed. The House and Senate Committee reports on the Act both note the existence of a "minimum" penalty of $100, without stating that the imposition of that minimum is conditioned upon the presence of a finance charge. S. Rep. No. 392, 90th Cong., 1st Sess. 9 (1967).[2] H. Rep. No. 1040, 90th Cong., 1st Sess. 19 (1968).[3] The phrases used by the House and Senate committees to describe the civil litigant entitled to damages, "an aggrieved debtor"[4] and "the consumer",[5] suggest that the committees had in mind as plaintiffs *any* non-commercial party engaged in a transaction with a creditor. The only detailed exposition of who could bring a civil action is found in a letter to the Senate Banking and Commerce Committee from the Attorney General suggesting some changes of language eventually adopted by that Committee and the Congress:

> Section 7(a) [1640(a)] of the bill provides that "any creditor who in connection with any credit transaction fails to disclose to any person any information in violation of this act . . . shall be liable in the amount of $100 . . ."
>
> This language may not indicate with precision who may sue the creditor for the civil penalty, in that it

[2] "Any creditor who fails to disclose the required information would be subject to a civil action with a penalty of twice the finance charge. *However*, the minimum penalty would be $100 and the maximum penalty would be $1,000."

[3] "Any creditor failing to disclose the required information would be subject to a civil suit with a penalty equal to twice the finance charge, with a minimum penalty of $100 and a maximum penalty not to exceed $1,000 on any individual credit transaction."

[4] H. Rep. No. 1040, 90th Cong., 1st Sess. 19 (1967).

[5] S. Rep. No. 392, 90th Cong., 1st Sess., 9, 21 (1968).

> refers to 'any person' to whom information is not disclosed in connection with a credit transaction. It would appear that the suit should be limited to *the person to whom the credit was actually extended without the required disclosures,* that is, the same person referred to in Section 4 [sections 1637-1639] of the statute.[6]

Plaintiff is, of course, a person to whom credit was extended without the required disclosures. The interpretation of a statute given to it publicly by administrative officials at or prior to its enactment is of course entitled to substantial weight. *Daniels* v. *United States,* 210 F. Supp. 942 (D. Mont. 1962).

Defendant's argument that a finance charge is a precondition of Section 1640(a) damages again proves too much. If that argument were upheld, it would literally repeal §1640(a) with regard to the whole class of loan, instalment, or open end credit contracts under which a finance charge could have been, but was not in fact, imposed. See Resp. Br. 13. Moreover such a construction would defeat the Board's purpose in promulgating the four instalment rule. Under defendant's construction of section 1640(a) the instant contract would violate the law on its face, but a private plaintiff could win neither statutory damages nor legal fees without proving the existence of a hidden finance charge. The difficulty of such proof, which the Board sought to avoid, would deter private actions such as this one and frustrate Congress's policy of securing enforcement through litigation commenced by private attorneys general.

Had Congress intended to limit civil sanctions to credit transactions involving a finance charge, it would have done

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[6] Hearings Before a Subcommittee of the Senate Banking and Currency Committee on S. 5, 90th Cong., 1st Sess. (1967), p. 29.

so expressly. Thus the House Banking and Currency Committee explicitly modified the original version of H.R. 11601 by making the civil penalty provision inapplicable to credit advertising violations.[7] "Where express exceptions are made the inference is a strong one that no other exceptions were intended." *United States* v. *City National Bank of Duluth*, 31 F. Supp. 530, 535 (D. Minn., 1939). Exceptions, such as that sought by defendant to section 1640(a), should not be implied in the absence of a clearly expressed Congressional purpose to exclude certain activities from the coverage of the law. Such an implied exception would, moreover, be inconsistent with the established policy of broadly construing remedial laws. *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968).

Defendant urges that in interpreting Section 1640 the court should use the statutory definition of "creditor" rather than the definition of "creditor" contained in the regulations. Def. Br. 35. The Board, however, indicated no desire to limit the use of its definition to any one section, and defendant offers no criterion for deciding which

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[7] H. Rep. No. 1040, 90th Cong., 1st Sess. (1968), 19 ("[T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement with the disclosure requirements of the bill, would attempt to seek civil penalties."); 114 Cong. Rec. 1427 (1968) (Congressman Patman, chairman of the House Banking and Currency Committee, reiterated, "It should be noted that while credit advertising is covered under certain of the disclosure provisions of the bill, such advertising cannot provide the basis for a civil suit. This exemption has been written into the bill by your committee to avoid the possibility that anyone seeing an advertisement not complying with disclosure requirements would attempt to seek civil penalties." Section 1640(a) as enacted provides civil penalties for violations "under this part," which means Part A of the law, §§1601-1641. Credit advertising is regulated under Part B, §§1661-1669. Of course plaintiff is, by contrast, "a party to an actual transaction."

definition should be used in the more than thirty other instances in which the term "creditor" appears in the statute.

The arguments that Section 1640(a) is penal in nature, and that the imposition of a finance charge is a precondition of liability, were considered in detail and expressly rejected in *Ratner* v. *Chemical Bank New York Trust Company*, 329 F. Supp. 270 (S.D., N.Y. 1971). The conclusions reached by the District Court in *Ratner* were manifestly correct and should be adopted by this Court.

B. The District Court's Finding That FPS Extended Credit Should Be Upheld.

The District Court ruled, based upon the evidence before it, that defendant had extended credit to plaintiff. That finding should not be reversed unless it was clearly erroneous. F.R.Civ. Proc. 52(a).

Defendant urges first that the instant contract did not involve an extension of credit because FPS was only obliged to deliver the goods after the customer had paid for them. This analysis of the contractual arrangement is completely at odds with the uncontroverted evidence presented to the District Court and that Court's findings. First, FPS is not itself a magazine publisher and does not itself supply customers with magazines or any other goods. Rather, in return for a customer's promise to pay, FPS contracts with third party publishers to enter subscriptions as desired by its customers.[8] Second, FPS does not perform piecemeal by contracting with the publishers periodically to provide magazines already paid for. Once the initial agreement with a customer is signed, FPS con-

[8] See e.g., Answer to Second Amended Complaint, App. p. 9; Defendant's Memorandum in Support of Motion for Summary Judgment, p. 2.

tracts with the publishers in advance to provide all the magazines over a period of years and unconditionally obligates itself to pay the publisher for those magazines.[9] Third, FPS actually pays the publishers in advance for the magazines to be delivered to a customer.[10] On the basis of this evidence the District Court concluded that plaintiff received, not merely a promise that FPS would itself deliver magazines after she paid for them, but "a *present* contract right—a subscription, in exchange for a promise to pay a certain sum in more than four installments." (App. p. 34) This finding and the evidence recited

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[9] On December 16, 1969, FPS wrote to plaintiff, "After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take." On December 24, 1969, FPS wrote her, "Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us." (App. 20-21). On April 9, 1970, FPS's manager wrote to plaintiff's counsel:

> Whereas, FPS, acts initially as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guarantor of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or in full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fullfilment of said terms in the aforementioned contract result in mutual resolve of liability. (App. p. 14)

FPS admitted all three letters were sent to plaintiff, but denied that its manager was authorized to send the letter of April 9, 1970.

[10] See the letter of December 24, 1969, *supra* (reference to repayment), letter of April 9, 1970 (reference to full investment and absence of refund to FPS from publisher). In its Answer, defendant averred that under its arrangement with "most" publishers it reimbursed the publisher periodically during the full term of the subscription. (App. p. 9.) This averment, while inconsistent with the April 9, 1970 assertion of "full" investment, is consistent with the December 24, 1969 claim that FPS was prepaying for magazines. FPS itself offered no evidence on this question before the District Court.

clearly support the District Court's conclusion that credit was extended even under defendant's own standards.

The District Court also concluded that the contract must be held to involve the extension of credit because the defendant itself so regarded it and so described it to plaintiff. (App. 34) Defendant urges, as it did without success in the District Court, that the relevant evidence suggests only that the relationship between itself and plaintiff *became* a creditor-debtor relationship after plaintiff refused to make further payments. The District Court, however, rejected that position, and described defendant's position as considering "the transaction to be a credit transaction." This holding was well founded upon a letter from plaintiff to defendant which stated:

> Again, let me remind you that you have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account,* and as such must be repaid by you on a monthly basis, much as if you had purchased any other type of merchandise on a monthly budget plan. (Letter of December 24, 1969, App. p. 20).[11]

The Defendant did not urge in the District Court and does not appear to urge here that it could successfully claim the contract is not covered by the Truth in Lending Act if it had earlier maintained and informed plaintiff that the transaction itself, and not merely their relationship when payments were withheld, involved an extension of credit.

The arguments asserted by Defendant are so sweeping in their scope as to seriously threaten the effectiveness of the Act. Defendant asserts that solely because it allegedly

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[11] The letter describes the monthly payments, not the overdue sum, as a credit account, and uses the verb "is" not "has become."

did not extend credit it is totally exempt from the Act. The argument does not depend on the absence of a finance charge; defendant claims that it should be allowed to impose a usurious finance charge in contracts such as these with consumers and still refuse to divulge the total price of the goods, the amount of the finance charge, or the annual interest rate. Such a holding by this Court would clearly frustrate the purpose of the statute.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed and defendant directed to pay plaintiff statutory damages in the amount of one hundred dollars plus the costs of this action together with a reasonable attorney's fee as required by 15 U.S.C. §1640(a)(2).

Respectfully submitted,

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November 3, 1972

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MOURNING *v.* FAMILY PUBLICATIONS SERVICE, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-829. Argued November 9, 1972—Decided April 24, 1973

Petitioner, who contracted to purchase magazine subscriptions from respondent, brought this action in District Court, alleging that respondent had failed to comply with the disclosure provisions of the Truth-in-Lending Act, as implemented by Federal Reserve Board "Regulation Z." The District Court found that respondent had failed to comply with Regulation Z, in that respondent had extended credit to petitioner, payable in more than four installments, without making the disclosures required by the Act. The Court of Appeals reversed, holding that the Board had exceeded its statutory authority in issuing Regulation Z since the regulation required disclosure in some credit transactions in which a finance charge had not been made, and, alternatively, that the regulation violated due process by creating a conclusive presumption that credit payments made in more than four installments included a finance charge. *Held:*

1. The "Four Installment Rule" of Regulation Z is a valid exercise of the Federal Reserve Board's rulemaking authority under the Truth-in-Lending Act. Pp. 6-21.

(a) Congress, which was well aware that merchants could evade the disclosure requirements of the Act by concealing credit charges, gave the Board broad rulemaking power to prevent such evasion, and, in the exercise of that power, the Board issued the challenged rule to deal with the practice of concealing finance charges in the cash price of merchandise sold. Pp. 6-12.

(b) No conflict arises from the fact that the Act mentions disclosure only in regard to transactions in which a finance charge is imposed while the disclosure requirements of the rule sometimes apply where no such charge exists, since Congress did not attempt to specify all types of situations under which the Board's regula-

tions might apply, and the deterrent effect of the rule clearly implements the objectives of the Act. Pp. 15-16.

(c) The Board had authority to promulgate a general rule to prevent circumvention, even if the rule embraces some transactions that the provisions of the Act might not on their face reach. *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365. P. 17.

(d) Existence of penalty provisions in the Act do not require a narrow construction of the Act's nonpenalty provisions. *FCC* v. *American Broadcasting Co.*, 347 U. S. 284, distinguished. Pp. 18-19.

2. Imposition, pursuant to § 130, of a minimum penalty of $100 in cases such as this where the finance charge is nonexistent or undetermined, but where disclosure has not been made, is a permissible sanction. Pp. 19-20.

3. In imposing a disclosure requirement on all members of a defined class to discourage evasion by a substantial portion of that class, the challenged regulation does not create a conclusive presumption violative of the Fifth Amendment. Pp. 20-21.

449 F. 2d 235, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which STEWART and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-829

Leila Mourning, Petitioner, *v.* Family Publications Service, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 24, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve whether the Federal Reserve Board exceeded its authority under § 105 of the Truth-in-Lending Act[1] in promulgating that portion of Regulation Z commonly referred to as the "Four Installment Rule."[2]

Respondent is a Delaware corporation which solicits subscriptions to several well known periodicals. In 1969, one of respondent's door-to-door salesmen called on the petitioner, a 73-year-old widow residing in Florida, and sold her a five-year subscription to four magazines. Petitioner agreed to pay $3.95 immediately and to remit a similar amount monthly for 30 months. The contract form she signed contained a clause stating that the subscriptions could not be cancelled and an acceleration provision similar to that found in many installment undertakings, providing that any default in installment payments would render the entire balance due. The contract did not recite the total purchase price of the subscriptions or the amount which remained unpaid after the initial remittance, and made no reference to service or finance

[1] 15 U. S. C. § 1604.

[2] 12 CFR § 226.2 (k) (1972).

charges. The total debt assumed by the petitioner was $122.45; the balance due after the initial payment was $118.50.

Petitioner made the initial payment, began to receive the magazines for which she had contracted, and then defaulted. Respondent declared the entire balance of $118.50 due and threatened legal action. Petitioner brought this suit in United States District Court, alleging that respondent had failed to comply with the disclosure provisions of the Truth-in-Lending Act. She sought recovery of the statutory penalty and reimbursement for the costs of the litigation, including reasonable attorney's fees.

In support of her claim, petitioner submitted to the District Court a series of "dunning" letters which she had received from respondent. One letter, dated December 16, 1969, stated:

> "After making the terms of our contract clear to you, we went ahead in good faith and had your subscriptions entered for the entire periods you had agreed to take. The contract you signed is: Not subject to cancellation after acceptance or verification.
>
> "Knowing, therefore, the obligations we have incurred in your name, we feel confident that you will continue your magazine subscriptions and make the convenient monthly payments regularly and promptly."[3]

A second letter, received a week later from respondent's agent, declared:

> "After an account is three months delinquent it is brought to my attention. I feel that you should realize that you are receiving our merchandise which we have paid for. *Had you dealt directly with the*

[3] App., at 21.

publishers yourself, you would have had to pay them in advance for the magazines.

"Again, let me remind you that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account, and as such must be repaid by you on a monthly basis,* much the same as if you had purchased any other type of merchandise on a monthly budget plan. [Emphasis supplied; underlined words are emphasized in the original letter]." [4]

Respondent admitted sending each of the above letters to petitioner.[5] In addition, respondent submitted one affidavit to the District Court, describing the nature of the contracts which it offered to its clients. The affidavit stated that a customer who ordered magazine subscriptions from respondent was required to pay for all magazines during the first half of the contract term.[6] Thus,

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[4] App., at 20.

[5] Petitioner also submitted to the court a letter sent to her legal counsel by respondent's officer manager. The letter stated:

"Whereas, FPS, acts initialy [*sic*] as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier and co-guaranter [*sic*] of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refunds in part or full from any, or, all publishers; for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract until fullfilment [*sic*] of said terms in the aforementioned contract result [*sic*] in mutual resolve of liability." App., at 14.

Respondent admitted that this letter had been written on its stationery by its employee, but denied that the employee was authorized to send it. Consequently, we do not consider the facts stated in the letter to have been admitted by respondent.

[6] Affidavit of Stanley R. Swanson, Vice President of Family Publications Service, Inc., Aug. 26, 1970, at 2 (District Court Record, at 198, 199). The affidavit also stated that, while customers of respondent were free to pay the entire price of their magazine subscriptions when their contract with respondent was signed, the

according to the affidavit, at all times during the course of a contract, a purchaser who has complied with the terms of the contract has paid for more magazines than she has received. Respondent did not, however, submit any affidavit to the court contesting any of the facts stated in its "dunning" letters. On this record, both parties moved for summary judgment, declaring explicitly that no factual question remained undecided.

Section 121 of the Truth-in-Lending Act requires merchants who regularly extend credit, with attendant finance charges,[7] to disclose certain contract information "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed. . . ."[8] Among other relevant facts, the merchant must, where applicable, list the cash price of the merchandise or service sold, the amount of finance and other charges, and the rate of the charges.[9] Failure to disclose renders the seller liable to the consumer for a penalty of twice the amount of the finance charge, but in no event less than $100 or more than $1,000.[10] The creditor may also be assessed for the costs of the litigation, including reasonable attorney's fees,[11] and in certain circumstances not relevant here, may be the subject of criminal charges.[12]

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price charged would be equal to the aggregate of the payments that would have been made had the customer elected to pay in installments. Respondent now admits that this statement was not true. In some cases, customers who agreed to pay the entire contract price immediately were charged less than the aggregate amount of the installment payments.

[7] Section 103 (f), 15 U. S. C. § 1602 (f). Certain transactions, not here relevant, are exempt under § 104, 15 U. S. C. § 1603.

[8] 15 U. S. C. § 1631.

[9] Section 128, 15 U. S. C. § 1638.

[10] Section 130, 15 U. S. C. § 1640.

[11] *Ibid.*

[12] Section 112, 15 U. S. C. § 1611.

Section 105 of the Act[13] provides:

"The [Federal Reserve] Board shall prescribe regulations to carry out the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."

Accordingly, the Board has promulgated Regulation Z, which defines the circumstances in which a seller who regularly extends credit must make the disclosures outlined in § 128.[14] The regulation provides that disclosure is necessary whenever credit is offered to a consumer "for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments."[15]

Relying on the rule governing credit transaction of more than four installments, the District Court granted summary judgment for petitioner. The court found that respondent had extended credit to petitioner,[16] which by agreement was payable in more than four install-

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[13] 15 U. S. C. § 1604.

[14] 15 U. S. C. § 1638.

[15] 12 CFR § 226.2 (k) (1972).

[16] Respondent challenges the finding of the District Court that credit was extended to petitioner. In some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer. However, in view of the admissions by respondent which were before the District Court, respondent's failure to controvert those admissions by affidavit, and the litigation posture which respondent has consistently maintained beginning in the District Court, *i. e.*, that no factual matters remained unresolved, we conclude that summary judgment on this issue was properly granted. Fed. Rule Civ. Proc. 56 (e).

ments, but had failed to comply with the disclosure provisions of the Act.

The Court of Appeals reversed, holding that the Board had exceeded its statutory authority in promulgating the regulation upon which the District Court relied. The regulation was found to conflict with § 121 of the Act [17] since it required that disclosure be made in regard to some credit transactions in which a finance charge had not been imposed. As an alternative ground for its decision, the Court of Appeals held that the regulation created a conclusive presumption that credit payments made in more than four installments included a finance charge. Relying on *Schlesinger* v. *State of Wisconsin*, 270 U. S. 230 (1926), and *Heiner* v. *Donnan*, 285 U. S. 312 (1932), the court concluded that such an irrebuttable presumption of fact violated the Due Process Clause of the Fifth Amendment.

I

Passage of the Truth-in-Lending Act in 1968 culminated several years of congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market. By the time of passage, it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from $5.6 billion to $95.9 billion, a rate of growth more than 4½ times as great as that of the economy.[18] Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment.[19] Because of the divergent, and at times fraudulent, practices

[17] 15 U. S. C. § 1631.

[18] H. R. Rep. No. 1040, 90th Cong., 1st Sess., 10–11 (1967).

[19] *Id.*, at 13; S. Rep. No. 392, 90th Cong., 1st Sess., 2–3 (1967).

by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet.[20] Joseph Barr, then Under Secretary of the Treasury, noted in testifying before a Senate subcommittee that such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers.[21]

The Truth-in-Lending Act was designed to remedy the problems which had developed. The House Committee on Banking and Currency reported, in regard to the then proposed legislation:

> "[B]y requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." [22]

This purpose was stated explicitly in § 102 of the legislation enacted:

> "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaging in the extension of consumer credit would be strengthened by the informed use of credit. The

[20] H. R. Rep. No. 1040, *supra*, n. 18, at 13; S. Rep. No. 392, *supra*, n. 19, at 1–2.

[21] Hearings on H. R. 11601 before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 90th Cong., 1st Sess., 76 (1967).

[22] H. R. Rep. No. 1040, *supra*, n. 18, at 13.

informed use of credit results from an awareness of the costs thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit."[13]

The hearings held by Congress reflect the difficulty of the task it sought to accomplish. Whatever legislation was passed had to deal not only with the myriad forms in which credit transactions then occurred, but also with those which would be devised in the future.[14] To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to entrust its construction to an agency with the necessary experience and resources to monitor its operation. Section 105 delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. The language employed evinces the awareness of Congress that some creditors would attempt to characterize their transactions so as to fall one step outside whatever boundary Congress attempted to establish. It indicates as well the clear desire of Congress to insure that the Board had adequate power to deal with such attempted evasion. In addition to granting to the Board the authority normally given to administrative agencies to promulgate regulations designed to "carry out the purposes" of the Act, Congress specifically stated:

"These regulations may contain such classifications, differentiations, or other provision, and may

[13] 15 U. S. C. § 1601.

[14] See letter from Paul R. Dixon, Chairman of the Federal Trade Commission, to Senator A. Willis Robertson, Chairman of the Senate Committee on Banking and Currency, Feb. 18, 1964, in Hearings on S. 750 before a Subcommittee on Production and Stabilization of the Senate Committee on Banking and Currency, 88th Cong., 1st and 2d Sess., 1303 (1963-1964).

provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper . . . to prevent circumvention or evasion [of the Act], or to facilitate compliance therewith." [25]

The Board was thereby empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled, no matter what adroit or unscrupulous practices were employed by those extending credit to consumers.

One means of circumventing the objectives of the Truth-in-Lending Act, as passed by Congress, was that of "burying" the cost of credit in the price of goods sold. Thus in many credit transactions in which creditors claimed that no finance charge had been imposed, the creditor merely assumed the cost of extending credit as an expense of doing business, to be recouped as part of the price charged in the transaction.[26] Congress was

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[25] 15 U. S. C. § 1604.

[26] For example, two merchants might buy watches at wholesale for $20 which normally sell at retail for $40. Both might sell immediately to a consumer who agreed to pay $1 per week for 52 weeks. In one case, the merchant might claim that the price of the watch was $40 and that the remaining $12 constituted a charge for extending credit to the consumer. From the consumer's point of view, the credit charge represents the cost which he must pay for the privilege of deferring payment of the debt he has incurred. From the creditor's point of view, much simplified, the charge may represent the return which he might have earned had he been able to invest the proceeds from the sale of the watch from the date of the sale until the date of payment. The second merchant might claim that the price of the watch was $52 and that credit was free. The second merchant, like the first, has forgone the profits which he might have achieved by investing the sale proceeds from the day of the sale on. The second merchant may be said to have "buried" this cost in the price of the item sold. By whatever name, the $12 differential between the total payments and the price at which the merchandise could have been acquired is the cost of differing payment.

well aware, from its extensive studies, of the possibility that merchants could use such devices to evade the disclosure requirements of the Act. The Committee hearings are replete with suggestions that such manipulation would render the Act a futile gesture in the case of goods normally sold by installment contract.[27] Opponents of the bill contended that the reporting provisions would actually encourage merchants who had formerly segregated their credit costs not to do so. They predicted that the effect of the Act would thus be to reduce the amount of information available to the consumer, a result directly contrary to that which was intended.[28] Proponents of the legislation claimed that the Act would enhance the consumer's ability to make an informed choice even if finance charges were hidden. In response to a claim that credit costs would be incorporated in the price of goods, Senator Douglas, who first proposed the Truth-in-Lending Act, stated:

> "I would like to call to your attention, Senator, for purposes of the record, that this bill does not pro-

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[27] Hearing on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency, 87th Cong., 1st Sess., 49, 56–57, 127, 289–290, 447–448, 563, 1155–1156 (1961); Hearings on S. 1740 before a Subcommittee of the Senate Committee on Banking and Currency, 87th Cong., 2d Sess., 16, 45, 265, 267–268, 287, 341–342, 360–361, 365–367, 376, 407, 415 (1962); Senate Hearings on S. 750, 88th Cong., 1st and 2d Sess., *supra*, n. 24, at 13–14, 749, 1284–1285; Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., 41–42, 123–124, 377–379, 513, 699 (1967); House Hearings on H. 11601, 90th Cong., 1st Sess., *supra*, n. 21, at 583, 590–591, 802, 825–826.

[28] Senate Hearings on S. 1740, 87th Cong., 2d Sess., *supra*, n. 27, at 287; Senate Hearings on S. 750, 88th Cong., 1st and 2d Sess., *supra*, n. 24, at 13–14; House Hearings on H. 11601, 90th Cong., 1st Sess., *supra*, n. 21, at 596.

vide for judgment solely on the basis of the . . . annual interest rate or the total finance charges. It also provides that there shall be a statement of the cash price or delivery price of the property or service to be acquired. Both things are to be stated, price and finance charges, and the judgment of the consumer can be on the basis of both of these factors, not merely on one alone; and if a merchant tries to have a low finance charge and bury it in a high cash price or delivered price, then the purchaser can shop on price just as much as on the finance charges."[29]

It was against this legislative background that the Federal Reserve Board promulgated regulations governing enforcement of the Truth-in-Lending Act. In September, 1968, with the aid of an advisory board composed of representatives of diverse retail, lending and consumer groups, the Board compiled and released a draft of proposed regulations.[30] Comments and criticisms from interested parties were invited. After more than 1,800 responses were received and considered by the Board, the regulations were reviewed and published in the Federal Register.[31]

The Four Installment Rule was included in the original published draft of the regulations and was not amended prior to its final adoption.[32] The Board's objective in promulgating the rule was to prevent the Act from ful-

[29] Senate Hearings on S. 1740, 87th Cong., 1st Sess., *supra*, n. 27, at 447–448. See also Senate Hearings on S. 1740, 87th Cong., 2d Sess., *supra*, n. 27, at 45.

[30] 33 Fed. Reg. 15506–15516 (1968).

[31] 34 Fed. Reg. 2002–2011 (1969).

[32] Compare § 226.2 (h), 33 Fed. Reg. 15507 (1968), with § 226.2 (k), 34 Fed. Reg. 2002 (1969).

filling the prophecy which its opponents had forecast. As J. L. Robertson, vice chairman of the Board of Governors, stated in an advisory letter issue a year later:

> "The Board felt that it was imperative to include transactions involving more than four installments under the Regulations since without this provision the practice of burying the finance charge in the cash price, a practice which already exists in many cases, would have been encouraged by Truth in Lending. Obviously this would have been directly contrary to Congressional intent." [23]

Furthermore, even as to sales in which it was impossible to determine what, if any, portion of the price recompensed the creditor for deferring payment, the regulation at least required that the consumer be provided with some information which would enable him to make an informed economic choice.[24]

II

The standard to be applied in determining whether the Board exceeded the authority delegated to it under the Truth-in-Lending Act is well established under our prior cases. Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," [25] we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of

[23] Federal Reserve Board Advisory Letter of March 1970, by J. L. Robertson. See also Federal Reserve Board Advisory Letter of Aug. 26, 1969, by J. L. Robertson.

[24] Statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System, in Hearings before the Subcommittee on Consumer Affairs of the House Committee on Banking and Currency, 91st Cong., 1st Sess., 380-381 (1969).

[25] *E. g.*, § 8 of the United States Housing Act of 1937, as amended, 42 U. S. C. § 1408.

the enabling legislation." *Thorpe v. Housing Authority of the City of Durham*, 393 U. S. 268, 280–281 (1968). See also *American Trucking Association, Inc.* v. *United States*, 344 U. S. 298 (1953).

We have also construed enabling provisions similar to § 105 of the Truth-in-Lending Act, in which Congress has stressed the agency's power to counteract attempts to evade the purposes of a statute. In *Gemsco, Inc.* v. *Walling*, 324 U. S. 244 (1945), we were asked to determine whether the Administrator of the Wage and Hour Division of the Department of Labor was empowered under the Fair Labor Standards Act of 1938 [36] to prohibit companies from allowing or requiring their employees to do industrial homework. The Act required the Administrator to approve orders which were designed to raise the minimum wage to 40 cents an hour. While the Act did not specifically mention industrial homework, § 8 (f) stated that the Administrator's orders—

> "should contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." [37]

After hearings, the Administrator determined that homework furnished "a ready means" of evading his orders, and prohibited certain companies subject thereto from employing this means of production. The Court concluded that the Administrator had not exceeded his authority under the Act, noting that a more restrictive interpretation of the enabling provision would have rendered the Act inoperable. Focusing on the mandate provided by § 8 (f), the Court stated:

> "When command is so explicit and, moreover, is reinforced by necessity in order to make it operative,

[36] 52 Stat. 1060 *et seq.*

[37] 52 Stat. 1065.

nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end to the matter." 324 U. S., at 255.

In light of our prior holdings and the legislative history of the Truth-in-Lending Act, we cannot agree with the conclusion of the Court of Appeals that the Board exceeded its statutory authority in promulgating the Four Installment Rule. Congress was clearly aware that merchants could evade the reporting requirements of the Act by concealing credit charges. In delegating rule making authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power.

Given that some remedial measure was authorized, the question remaining is whether the measure chosen is reasonably related to its objectives. We see no reason to doubt the Board's conclusion that the rule will deter creditors from engaging in the conduct which the Board sought to eliminate. The burdens imposed on creditors are not severe, when measured against the evils which are avoided. Furthermore, were it possible or financially feasible to delve into the intracacies of every credit transaction, it is clear that many creditors to whom the rule applies would be found to have charged for deferring

payment, while claiming they had not. That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. *Northwestern Co.* v. *Federal Power Commission*, 321 U. S. 119, 124 (1944); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 224 (1943); *American Telephone and Telegraph Co.* v. *United States*, 299 U. S. 232, 236 (1936).

Respondent contends, however, that the Four Installment Rule must be abrogated since it is "inconsistent" with portions of the enabling statute. The purported conflict arises because the statute specifically mentions disclosure only in regard to transactions in which a finance charge is in fact imposed,[33] although the rule requires disclosure in some cases in which no such charge exists. Respondent argues that, in requiring disclosure as to some transactions, Congress intended to preclude the Board from imposing similar requirements as to any other transactions.

To accept respondent's argument would undermine the flexibility sought in vesting broad rule making authority in an administrative agency. In *American Trucking Association* v. *United States*, 344 U. S. 298 (1953), we noted that it was not—

> "a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. . . . [N]o great acquaintance with practical affairs is required to know that such prescience, either in fact or

[33] Section 103 (f), 15 U. S. C. § 1602 (f); § 121, 15 U. S. C. § 1631; § 130 (a), 15 U. S. C. § 1640 (a).

in the minds of Congress, does not exist. [Citations omitted.] Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislature cannot be expected to possess." 344 U. S., at 309–310.

Neither the sections of the Truth-in-Lending Act which refer specifically to transactions involving finance charges nor any other sections of the Act indicate that Congress attempted to list comprehensively all types of transactions to which the Board's regulations might apply. To the contrary, § 105's broad grant of rule making authority reflects an intention to rely on those attributes of agency administration recognized in *American Trucking*. We cannot then infer that references in the Act to transactions involving credit charges were intended to limit the deterrent measures which the Board might choose.

Since the deterrent effect of the challenged rule clearly implements the objectives of the Act, respondent's contention is reduced to a claim that the rule is void because it requires disclosure by some creditors who do not charge for credit and thus need not be deterred. The fact that the regulation may affect such individuals does not impair its otherwise valid purpose. A similar contention was made in *Gemsco*, and rejected by the Court. Gemsco claimed that the Administrator was not attempting to enforce the requirements of the statute but was attempting to advance "experimental social legislation" which Congress had not approved. Responding to that argument the Court stated:

"Section 8 (f), in directing the Administrator to include 'such terms and conditions' as he 'finds neces-

sary to carry out the purposes of such order,' did not forbid him to take the only measures which would be effective, merely because other consequences necessarily would follow. The language neither states expressly nor implies that he is to do only what will achieve the stated ends and nothing more. The statute does not direct the Administrator to make the rate effective by all necessary means except those which may have other social or economic consequences." 324 U. S., at 257.

There the Court was referring to the regulation of subject matter, not specifically mentioned in the enabling legislation. A similar rule applies when a remedial provision requires some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control. In *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388–389 (1926), the Court held that, in defining a class subject to regulation, "the inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." See also *North American Company* v. *Securities and Exchange Commission*, 327 U. S. 686 (1946). Nothing less will meet the demands of our complex economic system. Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. That this rationale applies to administrative agencies as well as to legislatures is implicit in both *Gemsco* and *American Trucking Association*. In neither case was every individual engaged in the regulated activity responsible for the specific consequences the agency sought to eliminate.

Respondent argues that such an interpretation of the Truth-in-Lending Act is inconsistent with our holding in *Federal Communications Commission* v. *American Broadcasting Company*, 347 U. S. 284 (1954). In that case, the Court considered whether, in establishing regulations to govern programming, the FCC had properly interpreted a criminal provision prohibiting the broadcasting of lotteries. After noting that a given statute could not be construed one way for purposes of an administrative proceeding and another for criminal prosecution, the Court stated:

> "If we should give [the criminal provision] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases." 347 U. S. 296.

Since, in drafting its regulation, the Commission had failed to apply the well established rule that penal provisions must be construed narrowly, the Court held the regulation invalid.

Relying on *American Broadcasting*, respondent contends that the Truth-in-Lending Act must be construed narrowly since it contains penal provisions,[30] and that a narrow interpretation requires that the Board's rule be nullified. We cannot agree, however, that every section of an act establishing a broad regulatory scheme must be construed as a "penal" provision, as that term is used in *American Broadcasting*, merely because two sections of the act provide for civil and criminal penalties. Penal statutes are construed narrowly to insure that no individual is convicted unless "a fair warning [has first been] given to the world in language that the common world will understand of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U. S. 25,

[30] Section 112, 15 U. S. C. § 1611; § 130, 15 U. S. C. § 1640.

27 (1931).[40] Where, as here, the language of the challenged rule is explicit, that risk is not present. See *Kraus & Bros., Inc.* v. *United States*, 327 U. S. 614, 621-622 (1946).

We are also unable to accept respondent's argument that § 130[41] does not allow imposition of a civil penalty in cases where no finance charge is involved but where a regulation requiring disclosure has been violated. Section 130 provides that the penalty assessed shall be twice the amount of the finance charge imposed, but not less than $100. Since the civil penalty prescribed is modest and the prohibited conduct clearly set out in the regulation, we need not construe this section as narrowly as a criminal statute providing graver penalties, such as prison terms. We have noted above that the objective sought in delegating rulemaking authority to an agency is to relieve Congress of the impossible burden of drafting a code explicitly covering every conceivable future problem. Congress cannot then be required to tailor civil penalty provisions so as to deal precisely with each step which the agency thereafter finds necessary. In light of the emphasis Congress placed on agency rulemaking and on private and administrative enforcement of the Act, we cannot conclude that Congress intended those who failed

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[40] See *Kordel* v. *United States*, 335 U. S. 345 (1948). See also W. LaFave and A. Scott, Criminal Law (1972), at 72.

[41] 15 U. S. C. § 1640. This section refers only to the failure to provide "information required *under this part* to be disclosed. . . ." (Emphasis supplied.) The italicized language was added to the statute to distinguish disclosure required in regard to sales transactions from that required in regard to advertising. H. R. Rep. No. 1040, *supra*, n. 18, at 19, 30. The penalty provision applies both to the failure to disclose information specifically required by the statute and to the failure to abide by regulations promulgated by the Board to govern such disclosure.

to comply with regulations to be subject to no penalty or to criminal penalties alone. As the District Court concluded, imposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined.

Finally, the Four Installment Rule does not conflict with the Fifth Amendment under our holdings in *Schlesinger v. State of Wisconsin*, 270 U. S. 230 (1926), and *Heiner v. Donnan*, 285 U. S. 312 (1932). In *Schlesinger* and *Heiner*, we held that certain taxing provisions violated the Due Process Clauses of the Fifth and Fourteenth Amendments because they conclusively presumed the existence of determinative facts. The challenged rule contains no comparable presumption. The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges,[33] but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class.

The Truth-in-Lending Act reflects a transition in congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose. By erecting a barrier between the seller and the prospective purchaser in the form of hard facts, Congress expressly sought "to . . . avoid the uniformed use of credit." 15 U. S. C. § 1601. Some may claim that it is a relatively easy matter to calculate the total payments to which petitioner was committed by her contract with respondent; but at the time of sale, such computations are often not encouraged by the solicitor or performed by the pur-

[33] In regard to some transactions to which the Four Installment Rule applies, merchants need not report the amount and rate of finance charges. Federal Reserve Board Advisory Letter of July 24, 1969, by J. L. Robertson; Federal Reserve Board Letter No. 30, July 8, 1969, by Frederick Solomon.

chaser. Congress has determined that such purchasers are in need of protection; the Four Installment Rule serves to insure that the protective disclosure mechanism chosen by Congress will not be circumvented.

That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.

Reversed and remanded.

teenth Amendments because they conclusively presumed the existence of certain determinative facts. The challenged rule contains no comparable presumption. The rule was intended as a prophylactic measure; it does not presume that all creditors who are within its ambit assess finance charges,[26] but, rather, imposes a disclosure requirement on all members of a defined class in order to discourage evasion by a substantial portion of that class.

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SUPREME COURT OF THE UNITED STATES

No. 71-829

Leila Mourning, Petitioner, *v.* Family Publications Service, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 24, 1973]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST concur, dissenting in part.

I have concluded that this is not a proper case for summary judgment under Rule 56 (c), which provides that summary judgment only may be granted if there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." As I interpret the present record in light of our decisions, see, *e. g., Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144; *White Motor Co.* v. *United States*, 372 U. S. 253; *United States* v. *Diebold, Inc.*, 369 U. S. 654, there remains unresolved a genuine issue of material fact. Although I agree with the majority that Regulation Z is valid and accordingly would reverse the decision of the Court of Appeals, I would remand this case to the District Court for resolution of that material issue.

The disclosure provisions of the Truth-in-Lending Act apply only to an extension of "consumer credit." 15 U. S. C. § 1631. Thus, in order to assert successfully a claim under the Act for the statutory penalty and reimbursement for the costs of the action, see *id.*, § 1640, petitioner *inter alia* must satisfy her burden of proving that respondent extended consumer credit within the meaning of the Act. Section 103 (e) of the Act, 15 U. S. C. § 1602 (e), defines "credit" as "the right granted

by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." In her complaint, petitioner merely alleges that respondent "extends Consumer Credit as defined in Regulation Z, 12 C. F. R. 226.2 (K) . . . ." Respondent denies in its answer that its contract with petitioner involved a "credit transaction." In one paragraph respondent avers: "Under the contract executed by the customer and Defendant, the customer agrees to pay a stated amount per month for half of the life of the contract and Defendant agrees to supply the magazines for the full term of the contract. At all times the customer has prepaid for the magazines to be delivered. Under its arrangement with most of the publishers, Defendant reimburses the publisher periodically during the full term of the subscription." In another paragraph it avers: "At no point during the life of the contract has Defendant paid money to a third person or supplied goods or services to the customer for which reimbursement is expected from the customer in the future."

On the basis solely of these allegations, one would conclude that the contract between the petitioner and the respondent did not constitute a credit transaction. If respondent merely collected $3.95 per month from each customer and sent the receipts periodically to the publisher,[1] less the respondent's commission, respondent never would have made any advances for the customer, and the customer would owe nothing to the respondent for the loan of money or, in the words of the Act, as a "finance charge." On the other hand, if respondent advanced all or part of the subscription price to the publishers, respondent would be advancing "credit" for the

[1] There are suggestions in the record that respondent is a wholly owned subsidiary of Time, Inc. Respondent, however, sold not only Life, a Time, Inc., publication, but magazines of other publishers.

benefit of the customer.[2] The legislative history indicates that "the disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions . . . ."[3] As Professor Corbin has stated: "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered."[4] The Act, in defining "credit," refers to the deferred payment of a "debt." A debt, however, is more than a binding contractual obligation to pay a sum of money in the future upon the performance of certain conditions by the other party to the contract. It is an unconditional obligation to pay.[5] Thus, in my view, a proper resolution of the issue whether respondent extended credit to petitioner depends, at least in part, on the contractual relationships between the respondent and the publishers. The contracts between respondent and the publishers are not in the present record.[6]

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[2] In a free enterprise system, one must presume that there is a "finance charge" for the advance of credit. It would nonetheless be a "finance charge" although it were wholly undisclosed or not separately stated in an account rendered to the customer.

[3] S. Rep. No. 392, 90th Cong., 1st Sess. 14; H. R. Rep. No. 1040, 90th Cong., 1st Sess., 25.

[4] 3A A. Corbin, Contracts § 687 (1960). A published opinion of the Federal Reserve Board recognizes that installment payment plans may not involve an extension of credit when charges for services rendered do not exceed prior payments. FRB Opinion Letter No. 262 (1970).

[5] 3A A. Corbin, Contracts § 691 (1960).

[6] My Brother POWELL asserts that, given the undisputed fact that petitioner agreed to pay in advance, respondent as a matter of law could not have extended credit. *Post*, at ——. We do not, however, know what the financial relationships in this *tri-partite* arrangement are. For example, it may be that respondent advances the full five-year subscription price to the publisher on the subscriber's behalf

The pleadings, of course, are not the only papers to be considered by the District Court in determining whether one party or the other is entitled to summary judgment. Under Rule 56 (c) the court must consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . ." During the collection period, respondent had sent petitioner a dunning letter reminding her "that we have ordered these magazines in advance and that you have incurred an obligation to repay us. *This is a credit account*, and as such must be repaid by you on a monthly basis, much the same as if you had purchased any other type of merchandise on a monthly budget plan." Respondent formally admitted that it had sent this letter to petitioner. Accordingly, it was properly considered by the District Judge.[2] But, I do not view this "ad-

when the contract between the subscriber and respondent is executed. If that is so, the subscriber may receive an *unconditional* right to receive magazines from the publisher over the five-year period, whether or not he meets his contractual obligations with respondent. Under these circumstances, respondent will be acting as a financier, enabling the subscriber to take advantage of the publisher's five-year subscription offer, but yet to defer payment on the subscription price. Any "profit" respondent receives will be largely attributable to its services as a financier. I do not see that such a financial arrangement differs substantially from the case where a subscriber borrows the full subscription price from a bank and pays the publisher directly, obligating himself to repay the bank in equal installments, with interest, over two and one-half years. As my Brother POWELL argues, the subscriber under those circumstances will be advancing credit to the publisher because he has paid for all magazines in advance, but it cannot be doubted that at the same time the bank has advanced credit to the subscriber.

[2] Respondent mailed another letter to petitioner which stated: "Whereas, FPS, act initialy [*sic*] as agent for the various publishers; upon acceptance of her contract, FPS thereafter acts solely as financier, and co-guarantor of service with the various publishers; whereas, FPS, has fully invested in Mrs. Mourning's contract and does not receive refund in part or full from any, or, all publishers;

mission" as conclusive or sufficient proof that respondent had extended credit within the meaning of the Act at the time the contract between petitioner and respondent was entered into.[4] First, this is not an admission in terms that credit was extended within the meaning of the Act. Second, since respondent at the time the letter was sent was three months in arrears, it may be that respondent had advanced money on her account only after she failed to meet her contractual obligation. It is settled under our decisions that material lodged by the moving party "must be viewed in the light most favorable to the opposing party." *Adickes* v. *Kress & Co.*, *supra*, at 157, 158–159; *United States* v. *Diebold, Inc.*, *supra*, at 655.

Petitioner is not deprived of the benefit of this principle of interpretation merely because it did not file an affidavit controverting the contents of the letter. Rule 56 (e) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judg-

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for said FPS, investment, we therefore, must insist on compliance of your client to the terms of said contract . . . ."

Although respondent admitted that the letter appeared on its stationery and was written by an employee, it denied that the employee was authorized to send the letter. Accordingly, since there was an issue of fact whether the letter was authorized and thus a binding admission, the letter could not be considered properly on petitioner's motion for summary judgment. Cf. 3 Barron & Holtzoff, Federal Practice and Procedure § 1231, at 75 (1971 Supp.).

[4] We need not resolve here whether, if the contract was not originally a credit transaction, petitioner's own breach could have converted it retroactively into a credit transaction within the meaning of the Act.

ment, if appropriate, shall be entered against him." The Advisory Committee note on the amendment which added this provision to the Rule, however, stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented." We cited this comment with approval in *Adickes* v. *Kress & Co.*, *supra*, at 160. The moving party, in this case petitioner,[*] must meet her burden of showing the absence of a genuine issue as to any material fact. *Id.*, at 157. I cannot conclude that she met that burden. The District Judge was not possessed of sufficient information to resolve properly the issue whether credit had been extended. Under these circumstances, he should not have granted summary judgment. Cf. *White Motor Co.* v. *United States*, *supra*, at 263.

[*] Both parties moved for summary judgment. That does not relieve the District Judge of his responsibility to consider each motion separately in light of the theories advanced by each party and to proceed to trial if he concludes that there is a genuine issue of material fact to be resolved. See 6 Moore, Federal Practice ¶ 56.13.

SUPREME COURT OF THE UNITED STATES

No. 71-829

Leila Mourning, Petitioner, v. Family Publications Service, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 24, 1973]

MR. JUSTICE POWELL, dissenting.

I would affirm the judgment of the Court of Appeals on the ground that there was no extension of consumer credit within the meaning of the Truth in Lending Act.[1] The majority takes the position that the credit issue is a question of fact properly resolved against respondent on petitioner's motion for summary judgment below. I cannot agree. In my view, the undisputed facts establish as a matter of law that the transaction between petitioner and respondent did not involve an extension of consumer credit. For the same reason, while I am in agreement with much of MR. JUSTICE DOUGLAS' dissenting opinion, I see no reason to remand the case for the taking of evidence.

I

Clearly the Act applies only to transactions involving the extension of credit. The congressional declaration of purpose is explicit:

"The Congress finds that economic stabilization would be enhanced and the competition among the

[1] Having this view of the case, I find it unnecessary to address the other two issues, namely: (i) whether the Federal Reserve Board exceeded its authority in adopting Regulation Z, which extends the coverage of the Act to transactions in which no finance charge can be identified; and (ii) whether the civil penalty provision of 15 U. S. C. § 1640 (a) may validly be imposed in a case where, by concession of the parties on cross motions for summary judgment, the transaction does not involve a finance charge.

> various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." 15 U. S. C. § 1601.

The phrase "extension of consumer credit" is not defined in the Act. Nor does the Act's definition of "credit" provide any enlightenment.[2] However, a transaction is commonly understood to involve credit when one party receives value in exchange for his unconditional promise to pay the other party for such value in the future. The mere fact that a party obligates himself in a contract to pay for goods or services in installments over a period of time does not render the contract a credit transaction:

> "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without promising to render any performance in advance of full payment of the price of each instalment so rendered." 3A A. Corbin § 687 (1960).

The transaction before the Court may well have been a credit transaction, but it was *not respondent* that extended the credit. Petitioner obligated herself to pay in advance for the magazines she was to receive. The contract required petitioner to pay equal installments over a 30-month period, but respondent was obligated only to provide magazines over 60 months. In effect petitioner paid every month for two months' worth of magazines. Until the last magazine had been delivered, petitioner

[2] "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U. S. C. § 1602 (e). The Act provides no gloss on the terms "debtor" and "debt," and the definition of "creditor" is limiting rather than explanatory. ("The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a finance charge is required. . . ." 15 U. S. C. § 1602 (f).)

would have paid for more magazines than she received. Thus, the contract called for the extension of credit by petitioner to respondent. For this reason it was not an "extension of consumer credit" within the meaning of the Act. See 15 U. S. C. § 1602 (h).

The Federal Reserve Board, upon whose authority to interpret the Act the majority so heavily relies in sustaining Regulation Z, has indicated that a necessary element in a consumer credit transaction is the consumer's obligation to pay *after* he has received the bargained for goods or services. In a published Opinion Letter dealing with the practice of assessing obstetrical services in periodic installments, the Board stated that "[a]s long as there are no finance charges assessed, *and at no point do the charges for the services rendered exceed the payments to the extent that it would require more than 4 of the periodic intallments to repay the obligation,* then the plan would not fall within the provisions of Regulation Z."[3] (Emphasis supplied.) This statement implicitly recognizes that credit is extended only when the value of goods or services provided exceeds the payments made.[4]

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[3] FRB Opinion Letter No. 262 (1970); 4 CCH Consumer Credit Guide § 30,516.

[4] Legislative history bolsters the view that Congress assumed "credit" meant the receipt of goods or services in advance of paying for them. In earlier versions of the Act the definition of credit included ". . . any contract of sale of property or services, either for present or future delivery, under which part or all of the price is payable subsequent to the making of such sale or contract; . . . any contract or arrangement for the hire, bailment, or leasing of property. . . ." S. 1740, 87th Cong., 1st Sess.; S. 5, 90th Cong., 1st Sess. (as introduced January 11, 1967). During the Senate hearings, a question was raised as to whether any finance charge would be attributable to certain included transactions, particularly ordinary bailment and lease arrangements. Hearings on S. 5 before the Subcommittee on Financial Institutions of the Senate Committee on

II

Implicit in the positions both of MR. JUSTICE DOUGLAS and of the majority is the assumption that, even admitting petitioner was to pay for each magazine before receiving it, under some factual circumstances respondent might nevertheless have extended credit.[5] Thus, MR. JUSTICE DOUGLAS states that "if respondent advanced all or part of the subscription price to the publisher, respondent would be advancing credit for the benefit of the customer." The majority is less clear on this point,

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Banking and Currency, 90th Cong., 1st Sess., 663 (1967) (Statement of J. L. Robertson, Vice Chairman, Board of Governors of the Federal Reserve System). This criticism was heeded and the final version of the bill substituted the language now found in the Act (15 U. S. C. § 1602 (e)) with the following explanation: "The original S. 5 language was deleted because it was somewhat cumbersome and sweeping and referred to various types of lease situations which might not be true extensions of credit." S. Rep. No. 392, 90th Cong., 1st Sess., 12 (1967). In fact a lease, like the "paid during service" magazine contracts offered by respondent, often imposes a noncancellable obligation on the lessee or consumer to pay in a series of installments. Yet the lessor does not extend credit because the lessee ordinarily pays in advance for each period during which he enjoys the use of the property. Petitioner, by the same reasoning, was no more the recipient of credit than is the ordinary lessee or bailee. It would be inconsistent with this legislative history to read "extension of credit" to include every noncancellable installment obligation.

[5] The District Court found that there was no issue as to any material fact in this case. The Court of Appeals did not disturb this finding. Whether one agrees with this finding as does the majority or disagrees for reasons stated by MR. JUSTICE DOUGLAS, the District Court's conclusion that the uncontroverted facts establish a consumer credit transaction is clearly a conclusion of law and therefore is entitled to no presumption of correctness. Nor do respondent's dunning letters to petitioner describing her obligation as a credit account create any such presumption. Again, such statements only express a legal conclusion and do not establish the existence of a consumer credit transaction within the meaning of the Act.

stating only that "[i]n some cases in which a consumer pays in installments for a magazine subscription, credit may not have been extended to the consumer." N. 16, *supra.* The implication, however, is that in some such transactions, though the consumer pays for the magazines in advance, he may be the recipient of credit. I am unable to agree that under any set of circumstances, given the undisputed fact that petitioner agreed to pay in advance for each magazine, respondent might have extended credit. Petitioner did not obtain a loan from respondent which she would be unconditionally obligated to repay. She entered into a contract imposing continuing, mutually dependent obligations on both parties.[6] Whether respondent advanced any part of the subscription price to magazine publishers is quite immaterial to a determination of the legal effect of the only transaction involved in this case: whether there was extension of consumer credit *by respondent to petitioner.* The only contract at issue is that between the parties; how and upon what terms respondent may have arranged to obtain the magazines for delivery to petitioner in fulfillment of its contractual obligations is of no concern to

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[6] If respondent failed to deliver the magazines as agreed prior to completion of the specified payments, petitioner would have no further obligation to pay:

"A contract for the sale of goods may be an installment contract with respect to the goods sold as with respect to payments of the price. The non-delivery of an installment or delivery of a nonconforming installment when required by the contract is a breach for which an action can be maintained at once. There is no doubt that the buyer is privileged to withhold payment of the price of the undelivered installment or of a nonconforming installment that is rightfully rejected. . . . [T]he buyer does not have to extend such credit [beyond that which was agreed upon] to the seller by making payments without receiving the agreed goods." 3A A. Corbin, Contracts § 691, at 264 (1960). See Fla. Stat. §§ 672.2-612, 672.2-711, 672.2-717 (1969).

petitioner.[6] Nor can any such arrangement by respondent with a third party change the nature of the transaction between the parties to this litigation.[7]

The controlling facts therefore are not in dispute, having been admitted by the cross motions for summary judgment, and I can perceive of no way in which they can be construed as an extension of consumer credit by respondent to petitioner. A remand, unnecessarily burdening the parties and the court below, would serve no useful purpose. As a matter of law respondent did not extend credit within the meaning of the Truth in Lending Act. I would affirm the judgment below.

[7] Indeed, petitioner's complaint avers that the installment contract for the purchase and sale of the magazines is "the only instrument executed and existing between the parties," and that respondent thereby "extend[ed] consumer credit as defined in Regulation Z. . . ." There is no allegation as to extension of credit by the publishers or by any third person. Second Amended Complaint, App. 3, 4.